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## In re Sealed Case: The Attorney-Client Privilege - Till Death Do Us Part

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*IN RE SEALED CASE:*  
THE ATTORNEY-CLIENT PRIVILEGE—  
TILL DEATH DO US PART?

I. INTRODUCTION

"I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. Now please tell me the whole story."<sup>1</sup> These words capture the essence of the attorney-client privilege—a privilege long recognized as one of the cornerstones of the legal profession.<sup>2</sup>

The courts first recognized the attorney-client privilege over four centuries ago in Elizabethan England.<sup>3</sup> U.S. courts have accepted the privilege since the earliest days of the republic.<sup>4</sup> Since that time, the privilege

1. *In re Sealed Case*, 124 F.3d 230, 238 (D.C. Cir. 1997) (Tatel, J., dissenting).

2. See *In re Sealed Case*, 676 F.2d 793, 825 (D.C. Cir. 1982) (stating that "[t]he vitality of the adversary system is of great concern to us, as it is to all courts, and we have due regard for the importance of privilege in maintaining that vitality"); *United States v. Hodge & Zweig*, 548 F.2d 1347, 1355 (9th Cir. 1977) (noting that "the attorney-client privilege is central to the legal system and the adversary process"); 8 JOHN WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2291, at 546 (McNaughton rev. ed. 1961) (stating that attorney-client privilege is justified because "all people and all courts have looked upon th[e] confidence between the party and attorney to be so great that it would be destructive to all business if attorneys were to disclose the business of their clients'" (quoting *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1129, 1225, 1241 (Ex. 1743))); David A. Nelson, Comment, *Attorney-Client Privilege and Procedural Safeguards: Are They Worth the Costs?*, 86 Nw. U. L. REV. 368, 384 n.127 (1992) (noting that "[t]he attorney-client privilege has long been recognized as essential to a proper administration of justice'" (quoting *A.B. Dick Co. v. Marr*, 95 F. Supp. 83, 101 (S.D.N.Y. 1950))). One commentator asserted:

Our adversary system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong sentiment of loyalty attaches to the relationship, and this sentiment would be outraged by an attempt to change our customs so as to make the lawyer amenable to routine examination upon the client's confidential disclosures regarding professional business.

CHARLES MCCORMICK, *EVIDENCE* § 87, at 205-06 (3d ed. 1984).

3. See WIGMORE, *supra* note 2, § 2290, at 542-43 (noting that privilege dates back to reign of Queen Elizabeth I and citing various cases from sixteenth and seventeenth centuries to support contention that privilege already appeared to be "unquestioned"); James A. Gardner, *A Re-Evaluation of the Attorney-Client Privilege*, 8 VILL. L. REV. 279, 288-89 (1963) (stating that privilege was recognized during reign of Queen Elizabeth I).

4. See *Chirac v. Reinicker*, 24 U.S. 280, 294 (1826) (stating general rule that "confidential communications between client and attorney, are not to be revealed, at any time"); *Hart v. Thompson's Ex'r*, 15 La. 88, 93 (1840) (stating that attorney cannot be compelled to disclose communications of deceased client concerning dispositions in client's will).

has effectively conferred a means of protection against the forced disclosure of confidential legal discussions between lawyers and clients.<sup>5</sup>

The exact scope of the privilege, however, has recently become the focus of heated scholarly debate.<sup>6</sup> This debate stems from the fact that although the privilege encourages open discussion between clients and their counsel, it simultaneously obstructs the search for truth and the attainment of justice.<sup>7</sup> Consequently, the courts have concluded that the

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5. See *Fisher v. United States*, 425 U.S. 391, 403 (1976) (stating that "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged" (citing WIGMORE, *supra* note 2, § 2292, at 554)); *United States v. Grand Jury Investig.*, 401 F. Supp. 361, 369 (W.D. Pa. 1975) (asserting that foundation of attorney-client privilege is to assure that clients who seek advice from their attorneys will "be completely free of any fear that [their] secrets will be uncovered").

6. See, e.g., Gardner, *supra* note 3, at 286 (proposing that privilege be restricted to "face-to-face dealings" between attorney and client); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1063 (1978) (discussing impact of crime-fraud exception and tort exception upon attorney-client privilege); Fred D. Heather, *Attorney-Client Confidentiality: A New Approach*, 4 HOFSTRA L. REV. 685, 685 (1976) (arguing that conflict between confidentiality and achievement of justice is not inherently contradictory); Charles A. Miller, Comment, *The Challenges to the Attorney-Client Privilege*, 49 VA. L. REV. 262, 262-66 (1963) (discussing regulatory agency's challenge to attorney-client privilege and agency's insistence that its investigatory activities be allowed to proceed without obstruction by privilege); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 486-87 (1977) (arguing that balancing test should be applied to determine if attorney-client privilege applies, although interests will vary depending on whether case involves individual or corporate clients and whether case is civil or criminal).

7. See, e.g., *United States v. Zolin*, 491 U.S. 554, 562 (1989) (noting that one effect of attorney-client privilege is withholding of information from fact finder); *Trammel v. United States*, 445 U.S. 40, 50 (1980) (asserting that testimonial privileges "contravene the fundamental principle that 'the public . . . has a right to every man's evidence'" (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950))); *In re Horowitz*, 482 F.2d 72, 81 (2d Cir. 1973) (noting that privilege withholds evidence from factfinder); see also WIGMORE, *supra* note 2, § 2291, at 554 (recognizing that attorney-client privilege is "an obstacle to the investigation of the truth"); John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1485 (1966) (asserting that "[t]he privilege of confidentiality between lawyer and client is a significant barrier to the search for truth and the attainment of justice").

Some commentators have criticized the attorney-client privilege as establishing a shelter for the guilty because the disclosure of communications by an innocent client would not be damaging. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 6.1, at 246-47 (1986) (citing 7 JEREMY BENTHAM'S WORKS 473-75 (J. Bowring ed., 1843)). One scholar argues, however, that this argument is too simplistic because it presumes that clients are either entirely innocent or entirely guilty. See 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 181, at 304 n.16 (2d ed. 1994) (criticizing Bentham's argument that attorney-client privilege establishes shelter for guilty). Moreover, Bentham's argument fails to consider the possibility that some clients may be victims of incriminating circumstances that they would not want disclosed. See *id.* (noting that privilege also protects those who are not entirely innocent or guilty).

privilege should be narrowly construed.<sup>8</sup> Moreover, in recent years, a trend is emerging in which the courts are finding that the privilege protects fewer and fewer communications because its invocation occasionally hampers the judiciary's truth-finding function.<sup>9</sup>

For centuries, however, one aspect of the attorney-client privilege that has remained largely unchanged is the applicability of the privilege following a client's death.<sup>10</sup> Courts have generally held that the privilege applies regardless of whether the client is living or deceased.<sup>11</sup> The courts recog-

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8. See, e.g., *Fisher*, 425 U.S. at 403 (stating that attorney-client privilege "applies only where necessary to achieve its purpose"); *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("Whatever their origins, the[ ] exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."); *United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir. 1992) (stating that privilege must be narrowly construed); *In re Grand Jury Matter*, 969 F.2d 995, 997 (11th Cir. 1992) (same); *United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992) (same); *Fausek v. White*, 965 F.2d 126, 129 (6th Cir. 1992) (same); *Westinghouse Elec. Corp. v. Republic of the Phil.*, 951 F.2d 1414, 1423 (3d Cir. 1991) (same); *In re Grand Jury Investigation of Ocean Transp.*, 604 F.2d 672, 675 (D.C. Cir. 1979) (noting that privilege must be narrowly construed and may be voluntarily waived); *United States v. Osborn*, 561 F.2d 1334, 1339 (9th Cir. 1977) (stating that "the privilege is to be applied only when necessary to achieve its purpose of encouraging clients to make full disclosure to their attorneys" see also WIGMORE, *supra* note 2, § 2291, at 554 (noting that, because privilege frustrates truth-finding process, it should "be strictly confined within the narrowest possible limits consistent with the logic of its principle"). But see *Lohman v. Superior Court*, 146 Cal. Rptr. 171, 173 (Ct. App. 1978) (asserting that attorney-client privilege "should be regarded as sacred" (quoting *People v. Kor*, 277 P.2d 94, 100 (Cal. Dist. Ct. App. 1954) (Shinn, J., concurring))); *State v. Tensley*, 249 N.W.2d 659, 661 (Iowa 1977) (stating that privilege has been given "a liberal construction").

9. See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 921 (8th Cir. 1997) (refusing to recognize governmental attorney-client privilege when government official fears he or she may have violated criminal laws and confides in government attorney); *Georgia Pac. Corp. v. GAF Roofing Mfg. Corp.*, No. 93 Civ. 5125, 1996 WL 29392, at \*4-5 (S.D.N.Y. Jan. 25, 1996) (holding that attorney-client privilege was inapplicable because attorney acted as both negotiator and advisor on contract at issue and that New York privilege law did not protect attorney's business judgments).

10. See MCCORMICK, *supra* note 2, § 94, at 227 (noting that "[t]he accepted theory is that the protection afforded by the privilege will in general survive the death of the client"); SCOTT N. STONE & RONALD S. LIEBMAN, *TESTIMONIAL PRIVILEGES* § 1.19, at 34 (1983) (stating that general rule is that privilege survives death of client); WIGMORE, *supra* note 2, § 2323, at 630-31 (contending that "[i]t has . . . never been questioned . . . that the privilege continues even after the end of the litigation or other occasion for legal advice and even after the death of the client").

11. See MCCORMICK, *supra* note 2, § 94, at 227 (recognizing generally accepted principle that privilege will survive client's death); WIGMORE, *supra* note 2, § 2323, at 630 (asserting that "there is no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate"); Simon J. Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 GEO. J. LEGAL ETHICS 45, 46 (1992) (stating that "[c]ourts have generally, though not uniformly, held that the privilege continues to live whether or not the client does"); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (1995) ("A lawyer shall not reveal the infor-

nize a single exception to post death application of the privilege.<sup>12</sup> This exception involves cases dealing with interpretation of wills or other testamentary-related disputes.<sup>13</sup>

The United States Court of Appeals for the District of Columbia restricted the scope of the attorney-client privilege further by creating a new qualification to the privilege when it decided *In re Sealed Case*.<sup>14</sup> At issue in this case was whether the privilege automatically survives the death of a client when criminal litigation is pending.<sup>15</sup> The D.C. Circuit broke new legal ground by employing a balancing test to support its conclusion that the privilege did not apply in a criminal case after the death of the client.<sup>16</sup> The dissent, however, vigorously objected to such a balancing test,

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mation relating to representation of a client unless the client consents after consultation.").

12. See *Glover v. Patten*, 165 U.S. 394, 406 (1897) (concluding that communications between decedent and attorney not privileged in suit between devisees who are claiming under decedent's will); *Mehus v. Thompson*, 266 N.W.2d 920, 923 (N.D. 1978) (abrogating privilege when dispute is between parties claiming under decedent's will).

13. See *McCORMICK*, *supra* note 2, § 94, at 227-29 (discussing testamentary exception to attorney-client privilege and explaining various approaches used to nullify privilege in testamentary cases); *WIGMORE*, *supra* note 2, § 2329, at 639-40 (noting that deceased client's executor or administrator can waive privilege); *WOLFRAM*, *supra* note 7, § 6.3, at 256 (noting that exception does not apply to will-drafting attorney after client's death when lawyer's testimony involves preparation of will and litigation is between claimants "under and against the will"); Frankel, *supra* note 11, at 73-78 (describing testamentary exception to privilege). For a more detailed discussion of the testamentary exception to the attorney-client privilege, see *infra* notes 62-69 and accompanying text.

In addition to the testamentary exception, several other exceptions to the attorney-client privilege exist. Under the crime-fraud exception, the privilege does not apply when the client asks his or her attorney for assistance in carrying out future crimes or fraud. See, e.g., *United States v. Neal*, 27 F.3d 1035 (5th Cir. 1994) (holding that privilege terminates when client consults attorney seeking advice that will further intended or ongoing criminal activity). Under the common representation exception, the privilege may be inapplicable to a dispute between multiple clients who were originally on the same side of a transaction. See, e.g., *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103 (5th Cir. 1970) (holding that when corporation seeks advice from legal counsel, and information obtained from counsel relates to subject matter of later suit brought by minority shareholder in corporation, corporation is not entitled to claim privilege against its own shareholder). Lastly, the charge against the attorney exception holds that the privilege does not apply when the attorney and client become involved in a dispute between themselves regarding services provided by the attorney. See, e.g., *Laughner v. United States*, 373 F.2d 326, 327 n.1 (1967) (stating rule that client waives privilege by attacking attorney's performance "seems to have been adopted unanimously by those courts which have dealt with the question").

14. 124 F.3d 231 (D.C. Cir. 1997).

15. See *id.* at 231 (deciding whether attorney-client privilege should be abrogated when disclosure of attorney-client communications might provide significant evidence in criminal proceedings after death of client).

16. See *id.* at 234 (concluding that balancing test should be employed in cases involving criminal proceedings after death of client when evidence would otherwise be difficult to obtain).

and contended that the attorney-client privilege cannot be overcome by a showing of need for evidence in a criminal proceeding.<sup>17</sup>

This Note focuses on the refusal of the D.C. Circuit to uphold the attorney-client privilege in a nontestamentary context. Part II of this Note discusses the history and policies behind the attorney-client privilege that influenced the court in its decision to limit the privilege.<sup>18</sup> Next, Part III presents the facts and procedural history of *Sealed Case*.<sup>19</sup> Part IV analyzes the D.C. Circuit's reasoning and evaluates whether the court's abrogation of the privilege in the instant case was justified.<sup>20</sup> Finally, Part V of this Note discusses the possible effects that the D.C. Circuit's holding may have on the governance of lawyer-client relations and suggests that the D.C. Circuit's creation of a limited exception to the attorney-client privilege was inappropriate.<sup>21</sup>

## II. BACKGROUND

### A. *The History, Policy and Applicability of the Attorney-Client Privilege*

#### 1. *The History of the Attorney-Client Privilege*

The attorney-client privilege is one of the oldest evidentiary privileges.<sup>22</sup> Traceable back to Roman civil law, the privilege had become firmly established in the courts of England by the middle of the sixteenth century.<sup>23</sup> The early English rationale for the privilege was grounded in the belief that the oath and honor of the barrister and attorney protected

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17. See *id.* at 239 (Tatel, J., dissenting) (arguing that there is no case law supporting use of balancing test and emphasizing that attorney-client privilege cannot be defeated by showing of need). For a further discussion of Judge Tatel's dissent, see *infra* notes 118-29 and accompanying text.

18. For a discussion of the legal precedent that the D.C. Circuit analyzed in arriving at its holding, see *infra* notes 22-90 and accompanying text.

19. For a discussion of the facts and the procedural history of *Sealed Case*, see *infra* notes 91-99 and accompanying text.

20. For an analysis of the majority's reasoning in *Sealed Case*, see *infra* notes 100-17, 130-61 and accompanying text.

21. For a discussion of how the D.C. Circuit's decision will impact future cases dealing with the posthumous application of the attorney-client privilege, see *infra* notes 162-69 and accompanying text.

22. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (discussing history of attorney-client privilege); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 318 (7th Cir. 1963) (providing history of privilege and noting it was recognized by courts in Elizabethan England); *Union Carbide Corp. v. Dow Chem. Co.*, 619 F. Supp. 1036, 1046 (D. Del. 1985) (noting that privilege dates back to sixteenth-century England).

23. See WIGMORE, *supra* note 2, § 2290, at 542-43 (noting that privilege dates back to reign of Queen Elizabeth I, when it appeared to be unquestioned, and citing various sixteenth- and seventeenth-century cases); Gardner, *supra* note 3, at 288-89 (noting that Roman law influenced establishment of attorney-client privilege and that privilege was widely recognized during reign of Queen Elizabeth I "almost contemporaneously with the creation by statute of the general rule of compulsion"); Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 488 (1928) (discussing early Roman law providing that

them from being compelled to disclose the secrets of the client.<sup>24</sup> The emphasis on the code of honor, however, has long since subsided.<sup>25</sup> Consequently, modern courts instead focus almost exclusively upon the apprehensions and concerns of the client.<sup>26</sup>

## 2. *The Underlying Policies of the Attorney-Client Privilege: Utilitarianism vs. Nonutilitarianism*

Supporters of the modern attorney-client privilege offer two distinct justifications for the privilege.<sup>27</sup> The first and most widely accepted argument for the privilege has become known as the "utilitarian" approach.<sup>28</sup> The Supreme Court of the United States adopted this approach when it explained that the privilege is vital "to encourag[ing] full and frank com-

advocates could not be called as witnesses against their clients when trial was in progress).

Although the privilege was first recognized in sixteenth-century England, some scholars contend that the scope and conditions of the privilege were not established until more than two centuries later. See CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5472, at 71-77 (1986) (arguing that Wigmore's historical account of privilege is oversimplified and inaccurate); Gardner, *supra* note 3, at 289 (stating that "though the privilege was thus early established, the . . . scope and conditions of the privilege were not settled until after the middle of the nineteenth century"); Hazard, *supra* note 6, at 1070 (arguing that recognition of privilege was slow and halting well into nineteenth century).

24. See WIGMORE, *supra* note 2, § 2290, at 543 (stating that privilege was originally grounded in "a consideration for the oath and the honor of the attorney" rather than out of judiciary's concern for client). But see Deborah Stavile Bartel, *Drawing Negative Inferences upon Claim of the Attorney-Client Privilege*, 60 BROOK. L. REV. 1355, 1360-61 (1995) (arguing that attorney-client privilege may have originated as product of privilege against self-incrimination); *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1502 (1985) [hereinafter *Privileged Communications*] (arguing that historians cannot agree on why courts originally recognized privilege).

25. See WOLFRAM, *supra* note 7, § 6.1.2, at 243 (discussing shift away from early notion of "gentleman's honor" rationale of privilege).

26. See MCCORMICK, *supra* note 2, § 87, at 204 (stating that emphasis on code of honor had yielded by eighteenth century to concerns for client and ascertainment of truth); WIGMORE, *supra* note 2, § 2290, at 543 (contending that oath and honor rationale of privilege "was entirely repudiated" by last quarter of 1700s); WOLFRAM, *supra* note 7, § 6.1.2, at 243 (stating that "[t]he modern rationale is that the privilege serves the interests of clients in obtaining effective legal advice"); Frankel, *supra* note 11, at 49 (noting that "the present-day privilege is firmly rooted in concerns oriented towards the client"), Michael D. Marrs, *Attorney-Client Privilege*, 46 CHI.-KENT L. REV. 54, 54 (1969) (stating that "[a]s the privilege developed the theory of exclusion became more concentrated upon the apprehensions of the client").

27. See Frankel, *supra* note 11, at 49-55 (discussing utilitarian and privacy rationales for privilege); *Privileged Communications*, *supra* note 24, at 1502-04 (discussing schism between utilitarian and nonutilitarian justifications for privilege).

28. See Frankel, *supra* note 11, at 49-50 (stating that utilitarian approach is most widely accepted approach); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 358 (1989) (asserting that utilitarian-type rationale is primary argument in favor of attorney-client privilege).

munication between attorneys and clients.”<sup>29</sup> The utilitarian approach is premised upon the notion that a client will be more amenable to engage in an open discussion with his or her attorney if a client is assured that the conversation will not be subject to disclosure.<sup>30</sup> Because a client will be more inclined to disclose all information, both favorable and unfavorable, the lawyer will have the information necessary to properly defend or promote the client’s case.<sup>31</sup> Consequently, the adversarial system of justice will function more effectively if clients are assured that they can confide fully in their counsel without the fear that their secrets will be revealed.<sup>32</sup>

Under the utilitarian rationale, the exclusion of otherwise obtainable evidence is justified on the grounds that the justice system as a whole will

29. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

30. See Zacharias, *supra* note 28, at 358 (contending that clients may not employ attorneys or may not be forthcoming in revealing information if client is not assured of confidentiality). One early court has contended: “If the privilege did not exist at all, everyone would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case.” WIGMORE, *supra* note 2, § 2291, at 546 (quoting *Greenough v. Gaskell*, 39 Eng. Rep. 618, 620 (Ch. 1833)).

The degree to which the privilege actually encourages the client to reveal sensitive information to his or her attorney has been the subject of academic dispute for some time. See Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 924-25 (1982) (noting that patients of psychotherapists will still reveal sensitive information to psychotherapist regardless of whether privilege exists); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1231-32 (1962) (suggesting that correlation between existence of privilege and client’s willingness to be candid with attorney is weak).

31. See *In re Shangel*, 742 F.2d 61, 62 (2d Cir. 1984) (stating that privilege “encourag[es] clients to make the fullest disclosure to their attorneys [and therefore] enables the latter to act more effectively, justly, and expeditiously” (quoting 2 JACK B. WEINSTEIN & MARGARET A. BERGER, EVIDENCE § 503(02) (1982))); see also Bartel, *supra* note 24, at 1365 (noting that lawyer who knows all relevant information will be better prepared in assisting and advising client).

32. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) (contending that attorney-client privilege is essential for procuring effective legal advice and consequently “[t]he social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases” (quoting MODEL CODE OF EVIDENCE Rule 210 cmt. (1942))).

One commentator explains the utilitarian rationale in terms of a three-step syllogism. See Zacharias, *supra* note 28, at 358. The first part of the syllogism is that for the adversary system to function, citizens need lawyers to resolve their disputes and lawyers need to be able to represent their clients effectively. See *id.* (discussing needs of client and lawyer in adversary system). Part two of the syllogism proposes that attorneys can be effective only if they are provided with all of the relevant facts. See *id.* (describing attorney’s need for all pertinent information). Finally, clients may not employ attorneys, or at least not provide them with adequate information, unless the client is assured that the relationship will remain confidential. See *id.* (discussing adverse effects if clients are not assured of confidentiality in their dealings with their attorneys).



benefit from the privilege.<sup>33</sup> Thus, the protection provided by the privilege extends beyond the individual client to society at large.<sup>34</sup> As the Supreme Court stated, “[t]he privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”<sup>35</sup>

The second justification for the privilege has been classified as the “nonutilitarian” or “rights-based” rationale.<sup>36</sup> Unlike the utilitarian rationale, the nonutilitarian rationale focuses on the clients as individuals rather than on society as a whole.<sup>37</sup> The rights-based rationale contends that the attorney-client privilege is justified because it protects both the privacy and the dignity of the client.<sup>38</sup> The core of this justification rests upon the belief that it is “intrinsically wrong” for courts to compel revelation of attorney-client confidences in specific circumstances.<sup>39</sup> Underpinning this

33. See MCCORMICK, *supra* note 2, § 72, at 171 (stating that privilege protects “interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice”).

34. See *Privileged Communications*, *supra* note 24, at 1505 (noting that utilitarian rationale focuses “not on the benefits produced during particular lawsuits, but on the aggregate benefits that accrue from having the privilege in all court cases”).

35. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

36. See Bartel, *supra* note 24, at 1363-64 (describing nonutilitarian rationale for privilege); see also WRIGHT & GRAHAM, *supra* note 23, § 5472, at 77 (terming nonutilitarian approach as “noninstrumental” approach); Frankel, *supra* note 11, at 53-55 (focusing on privacy aspect of nonutilitarianism); *Privileged Communications*, *supra* note 24, at 1501 (noting that nonutilitarian rationale often takes form of theory of rights). One authority contends that the utilitarian and nonutilitarian rationales are not as distinct and irreconcilable as their proponents contend. See *id.* at 1504-09 (suggesting that utilitarian and nonutilitarian rationales can be combined).

Another justification for the attorney-client privilege associates the privilege with a categorical imperative. See Brian R. Hood, Note, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client*, 7 GEO. J. LEGAL ETHICS, 741, 761 (1994). Under this justification, a trusting attorney-client relationship is itself the primary, intrinsic value of the principle of confidentiality. See *id.* (arguing that intrinsic value of having good attorney-client relationship justifies privilege). Consequently, the attorney-client privilege does not lend itself to interest balancing and should be nearly absolute. See *id.* (comparing privilege to notion of categorical imperative that should be absolute except in extraordinary circumstances).

37. See WRIGHT & GRAHAM, *supra* note 23, § 5472, at 77 (stating that “[u]nlike the [utilitarian] argument, [the nonutilitarian argument] does not depend on any assumption or proof of the consequences likely to follow such disclosures”); Frankel, *supra* note 11, at 55 (noting that focus is not on clients generally, but rather on clients as individuals).

38. See Bartel, *supra* note 24, at 1363 (stating that nonutilitarians view attorney-client privilege “as a protection of the right of privacy and as a promotion of the right of individual independence and autonomy within the confining framework of a given system of laws”); Hood, *supra* note 36, at 760-61 (noting that privacy and individual dignity are primary arguments in favor of nonutilitarian rationale).

39. *Privileged Communications*, *supra* note 24, at 1501. One authority suggests that the crux of the nonutilitarian argument is best expressed by characterizing the

rationale is the notion that “‘there are things more important to human liberty than accurate adjudication.’”<sup>40</sup>

### 3. *When the Attorney-Client Privilege Applies*

Generally, the attorney-client privilege applies to those confidential communications between the attorney and the client through which the client is seeking legal advice.<sup>41</sup> The principles of the privilege have been summarized as follows:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.<sup>42</sup>

The privilege belongs to the client alone and not to the attorney.<sup>43</sup> Although the privilege protects the attorney from forced disclosure of the client's confidential communication, the attorney must assert the privilege on behalf of his or her client whenever it applies.<sup>44</sup> Specifically, the privi-

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forced disclosure of attorney-client communications as involving a “compulsory ‘betrayal.’” See WRIGHT & GRAHAM, *supra* note 23, § 5472, at 77. According to one proponent of the nonutilitarian rationale, “it was obvious that ‘every feeling of justice, honour, and humanity would be shocked’ by the attorney’s revelation of his client’s secrets,” and consequently judicial sanction would not change the public’s disdain for such conduct. *Id.* (quoting 1 EDWARD LIVINGSTON, COMPLETE WORKS 461, 462 (1873)).

40. Frankel, *supra* note 11, at 55 (quoting DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE 110 (2d ed. 1985)).

41. See *United States v. Aramony*, 88 F.3d 1369, 1390-91 (4th Cir. 1996) (noting that attorney-client privilege applies only when person seeking legal advice from attorney is that attorney’s client and attorney is acting in his or her professional capacity), *cert. denied*, 117 S. Ct. 1842 (1997); MURL A. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 2.02, at 2-11 (1982) (stating that “[t]he privilege arises whenever legal service, assistance, advice, or opinion is sought from a professional legal adviser in his/her capacity as and under circumstances that support a finding of an attorney-client relationship”).

42. WIGMORE, *supra* note 2, § 2292, at 554. One commentator has noted that such a summary of the privilege lacks completeness and fails to recognize important jurisdictional variations of the privilege. See WOLFRAM, *supra* note 7, § 6.3.1, at 250-51 (stating that “[a]ny general encapsulation sacrifices completeness for brevity and overlooks important jurisdictional variations”).

43. See WIGMORE, *supra* note 2, § 2321, at 629. At early common law, however, the privilege belonged entirely to the attorney and he or she was free to keep the communications secret or disclose them as he or she saw fit. See Gardner, *supra* note 3, at 289 (discussing attorney’s control of privilege under early common law).

44. See WOLFRAM, *supra* note 7, § 6.3.4, at 253 (noting that “[t]he duty to invoke the privilege is one of professional responsibility and does not depend on the client’s independent request to the lawyer to do so”); Nelson, *supra* note 2, at 385 (stating that “[w]hile the privilege protects the attorney from coerced divulsion of the client’s confidential communication, the attorney has no discretion to decide whether to exercise the privilege”).

lege is applicable at all stages of all judicial actions, cases and proceedings, including discovery and grand jury proceedings.<sup>45</sup>

## B. *The Effect of the Client's Death on the Attorney-Client Privilege*

### 1. *The General Rule*

Before the D.C. Circuit's holding in *Sealed Case*, both state and federal courts have consistently applied the common law rule that the privilege continues to protect the client after the client's death, despite the fact that harsh consequences may result.<sup>46</sup> *In re John Doe Grand Jury Investigation*<sup>47</sup> illustrates the application of the common law rule in a criminal case in which the client had died before trial.<sup>48</sup> The client shot and killed his pregnant wife and subsequently spoke with his attorney about the mur-

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45. See FED. R. EVID. 1101.1(c) (stating that "[t]he Rule with respect to privileges applies at all stages of all actions, cases, and proceedings"); see also *United States v. Rockwell Int'l*, 897 F.2d 1255, 1264 (3d Cir. 1990) (noting that attorney-client privilege may be applied to summons by Internal Revenue Service (IRS) if all other conditions of privilege are met); *In re Berkley & Co.*, 629 F.2d 548, 553-54 (8th Cir. 1980) (noting that attorney-client privilege generally applies to grand jury proceedings); *In re Grand Jury Subpoena*, 599 F.2d 504, 509 (2d Cir. 1979) (same).

46. See, e.g., *United States v. White*, 970 F.2d 328, 334 (7th Cir. 1992) (stating that privilege survives termination of attorney-client relationship); *United States v. Osborn*, 561 F.2d 1334, 1340 (9th Cir. 1977) (stating that communications remain privileged after death of decedent except if such communications pertain to litigation between parties claiming under testator); *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953) (stating that attorney "is enjoined for all time . . . from disclosing matters revealed to him by reason of the confidential relationship"); *State v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976) (stating that "[t]he privilege does not terminate with death"); *Peyton v. Werhane*, 11 A.2d 800, 803 (Conn. 1940) (noting that documents that amounted to confidential communications during existing attorney-client relationship cannot be compelled from attorney after client's death); *Bailey v. Chicago, Burlington & Quincy R.R. Co.*, 179 N.W.2d 560, 564 (Iowa 1970) (noting that "the protective shield provided by [the privilege] generally survives the client's death"); *Payne v. Payne's Adm'r*, 161 S.W.2d 925, 926-27 (Ky. 1942) (finding that communication between attorney and deceased client was not admissible as evidence because communication was privileged); *In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 70 (Mass. 1990) ("It is important to note that the attorney-client privilege survives the client's death."); *State v. Doster*, 284 S.E.2d 218, 219 (S.C. 1981) (stating that "privilege belongs to the client and, unless waived by him, survives even his death"); *Martin v. Shaen*, 156 P.2d 681, 684 (Wash. 1945) (noting that "the privilege does not terminate with the cessation of the protected relationship, but continues thereafter, even after the death of the person to whom the privilege is accorded").

Nevertheless, the common law rule has been sharply criticized by some commentators. See MCCORMICK, *supra* note 2, § 94, at 229 (arguing that privilege could be terminated by client's death without discouraging free communication between attorney and client); WRIGHT & GRAHAM, *supra* note 23, § 5498, at 484-86 (opposing continuation of privilege after death of client).

47. 562 N.E.2d 69 (Mass. 1990).

48. *Id.* at 72 (holding that attorney-client privilege remains following death of client who faced criminal charges).

der.<sup>49</sup> Shortly thereafter, the client committed suicide.<sup>50</sup> The prosecution then filed a motion to compel his attorney to testify before the grand jury concerning the substance of his interview with the now-deceased client.<sup>51</sup>

The Supreme Judicial Court of Massachusetts held that the attorney could not be compelled to testify about the conversation with his deceased client, even though the client was dead and his attorney's testimony could have alleviated the need for further investigation into the murder.<sup>52</sup> In reaching this conclusion, the court flatly rejected a balancing approach that weighs the interests of the deceased with the plaintiff's interests in disclosure, as adopted by a Pennsylvania court.<sup>53</sup>

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49. See Frances M. Jewels, Comment, *Attorney-Client Privilege Survives Client's Death*—In re John Doe Grand Jury Investigation, 408 Mass. 480, 562 N.E.2d 69 (1990), 25 SUFFOLK U. L. REV. 1260, 1260-61 (1991) (discussing decedent's involvement in death of his wife). Investigators believed that the decedent killed his wife to collect on several insurance policies that totaled more than a half-million dollars. See *id.* at 1261 n.8, 10. Before succumbing to the gunshot wounds, the decedent's wife gave birth to a son, who died 17 days later. See Frankel, *supra* note 11, at 45.

50. See *John Doe*, 562 N.E.2d at 69 (noting that decedent met for two hours with his attorney one day before he committed suicide).

51. See *id.* (noting that Commonwealth of Massachusetts filed order to compel decedent's attorney to disclose contents of his interview with decedent). The executrix of the decedent's estate informed the grand jury that she was not certain whether she had the right to waive the decedent's privilege, and that if she did have the power to waive the decedent's privilege, she refused to exercise that power. See *id.* For a discussion of waiver of the attorney-client privilege by a deceased client's representative, see WIGMORE, *supra* note 2, § 2329, at 639-41 and WRIGHT & GRAHAM, *supra* note 23, § 5498, at 483-86.

52. See *John Doe*, 562 N.E.2d at 72 (holding that "the attorney-client privilege should not yield either before or after the client's death to society's interest, as legitimate as we recognize that interest is, in obtaining every man's evidence").

53. See *id.* at 70-71 (rejecting balancing test that weighed interests of decedent against societal interests).

The *John Doe* court rejected a balancing test employed in *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976). See *John Doe*, 562 N.E.2d at 71. In *Cohen*, the plaintiff brought suit against a taxi cab company to recover for injuries that the plaintiff sustained when she was struck by a motor vehicle while crossing the street. See *Cohen*, 357 A.2d at 690. There was a question as to whether the driver of the cab was actually the one responsible for hitting the plaintiff. See *id.* at 690-91. Following the accident, the driver met with his attorney and informed him that he was indeed the driver who struck the plaintiff. See *id.* at 691. After the meeting, the cab driver died. See *id.* The court found that the driver's conversation did not contain "scandalous and impertinent matter" that would tarnish the memory of the decedent. *Id.* at 693. The *Cohen* court also found a need for the testimony of the decedent's lawyer, because the plaintiff did not see who struck her in the road and there were no witnesses. *Id.*

The court in *Cohen* balanced the interests of the decedent against those of the plaintiff and found that the decedent's rights, estate or memory would not be harmed by revealing the contents of the conversation. *Id.* (applying balancing test). Consequently, the *Cohen* court concluded that the privilege should be abrogated because of concerns for justice. *Id.* at 693-94 (stating that "[t]he privilege exists only to aid in the administration of justice, and when it is shown that the

Although the Massachusetts court acknowledged that the privilege frustrates the fact-finding process, it adopted the utilitarian approach.<sup>54</sup> The court contended that both the client's and the public's interests are best served by maintaining the privilege after death.<sup>55</sup> Specifically, the court explained:

[E]xtraordinarily high value must be placed on the right of every citizen to obtain the thoughtful advice of a fully informed attorney concerning legal matters. A rule that would permit or require an attorney to disclose information given to him or her by a client in confidence, even though such disclosure might be limited to the period after the client's death, would in many instances, we fear, so deter the client from "telling all" as to seriously impair the attorney's ability to function effectively.<sup>56</sup>

Similarly, in *State v. Macumber*,<sup>57</sup> a convicted murderer appealed his sentence on the grounds that another individual had confessed to the killings for which the appellant was being tried.<sup>58</sup> The confession was made to two attorneys who were willing to testify on behalf of the appellant, because the individual who was said to have confessed had died before trial.<sup>59</sup> The Supreme Court of Arizona held that the decedent's confession was privileged and disallowed its admission into evidence.<sup>60</sup> In reach-

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interests of justice can only be frustrated by the exercise of the privilege, the trial judge may require that the communication be disclosed").

The *John Doe* court argued that *Cohen* was factually distinguishable from *John Doe*. See *John Doe*, 562 N.E.2d at 71 (noting that "[t]here are clear factual distinctions between the *Cohen* case and the present matter"). Moreover, the *John Doe* court contended that the balancing test of *Cohen* would create a chilling effect and impair the attorney's ability to perform effectively. *Id.* (disagreeing with application of balancing test in *Cohen*).

54. See *John Doe*, 562 N.E.2d at 70, 71 (recognizing that attorney-client privilege frustrates fact-finding process, but emphasizing that privilege permits attorney to function effectively and prevents chilling effect on client-attorney communications).

55. See *id.* (stating that balancing test proposed by *Cohen* court "is inconsistent with the traditional value our society has assigned, in the interests of justice, to the right to counsel and to an effective attorney-client relationship").

56. *Id.* at 71.

57. 544 P.2d 1084 (Ariz. 1976).

58. *Id.* at 1086 (discussing appellant's allegation that another person committed murders in question). The appellant was found guilty in the trial court of two counts of first degree murder. See *id.* at 1085 (noting that appellant was sentenced to two concurrent terms of life imprisonment as punishment for murders). One of the crucial items of evidence that connected the appellant to the murders was the fact that the markings on the .45-caliber shell casings found at the crime scene allegedly were made by the ejector of a semiautomatic pistol of the same caliber owned by the appellant. See *id.* at 1086.

59. See *id.* (stating that trial court refused evidence finding on basis that discussion between decedent and lawyers was privileged).

60. See *id.* (stating that attorney-client privilege is governed by statute and attorney is not permitted to waive privilege in this case). The court further noted:

ing its conclusion, the court stated that unless the client or someone authorized by law waives the privilege, "[t]he privilege does not terminate with death."<sup>61</sup>

## 2. *The Testamentary Exception to the Attorney-Client Privilege*

Despite the general rule that the privilege survives the death of the client, one notable exception to the posthumous application of the privilege exists—the testamentary exception.<sup>62</sup> This exception arises in cases involving the validity or interpretation of a will or in other disputes between parties claiming under and against the testator's will.<sup>63</sup> *Glover v. Patten*<sup>64</sup> is one of the foremost cases dealing with the testamentary exception.<sup>65</sup> In a dispute between children claiming under their mother's will, the United States Supreme Court held that "in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged."<sup>66</sup>

Justifying the testamentary exception, the *Glover* Court noted that all of the parties claimed under the client's will, and therefore, no conflict between the interests of the decedent and disclosure existed.<sup>67</sup> The Court

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"The legislature has presumably weighed the possibility of hampering justice in originally providing for the privilege." *Id.*

61. *Id.* The court also discussed the testamentary exception to the privilege, stating that the privilege "has been commonly suspended only in cases where the communication would be logically thought to further the interests of the deceased such as a will." *Id.*

62. See Frankel, *supra* note 11, at 47 (stating that testamentary exception is "[t]he single uniformly recognized exception" to general rule that privilege survives death of client); see also STONE & LIEBMAN, *supra* note 10, § 1.19, at 35 (stating that rationale for privilege is destroyed when will contest or controversy regarding who shall be decedent's proper successor exists); WOLFRAM, *supra* note 7, § 6.3, at 256 (noting that it is commonly recognized that general rule does not apply to testimony of will-drafting lawyer after death of client when lawyer's testimony concerns contents of client's will).

63. See McCORMICK, *supra* note 2, § 94, at 133 (stating that testamentary exception applies in cases involving validity of will or other dispute between parties claiming by succession from testator at testator's death); WOLFRAM, *supra* note 7, § 6.3, at 256 (noting that "it is commonly recognized that the privilege does not apply to testimony by a will-drafting lawyer after a client's death when the lawyer's testimony concerns the circumstances of the preparation and execution of the client's will and the litigation is between claimants under and against the will").

64. 165 U.S. 394 (1897).

65. See McCORMICK, *supra* note 2, § 94, at 228 n.6 (citing *Glover* for proposition that privilege does not apply when all parties claim under deceased client); Frankel, *supra* note 11, at 76 (noting that subsequent cases have employed reasoning of *Glover* to develop theory that when all claimants are representatives of deceased, they have essentially waived attorney-client privilege).

66. *Glover*, 165 U.S. at 406.

67. See *id.* at 407 (stating that "[i]n the cases of testamentary dispositions, the very foundation on which the [privilege] proceeds seems to be wanting; and in the absence, therefore, of any illegal purpose entertained by the testator, there does not appear to be any ground for applying it" (quoting *Russell v. Jackson*, 68 Eng. Rep. 558, 560 (Ch. 1851))).

emphasized, however, that the exception to the privilege is limited and applies only to those persons who claim through the testator under the testator's will.<sup>68</sup> Additionally, the *Glover* Court stated that outside of the testamentary context, the privilege survives the death of the client.<sup>69</sup>

C. *The Quest for Certainty and the Supreme Court's Expansion of the Attorney-Client Privilege*

In 1981, the United States Supreme Court took a significant step in expanding the attorney-client privilege when it decided *Upjohn Co. v. United States*.<sup>70</sup> In *Upjohn*, a unanimous Supreme Court held that a corporation's attorney-client privilege may protect both written and verbal communications between corporate counsel and lower-level employees.<sup>71</sup> In

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According to one commentator, the approach that the *Glover* Court adopted in upholding the testamentary exception to the privilege is similar to a conception of an implied waiver. See Frankel, *supra* note 11, at 76. In an implied waiver situation in which the dispute is between heirs to the decedent, the opposing claimants are all representatives of the deceased. See Hood, *supra* note 36, at 765. Consequently, to effectuate the decedent's will, the parties are considered to have essentially waived the privilege. See *id.*; see also *Olsson v. Pierson* 25 N.W.2d 357, 362-63 (Iowa 1946) (holding that privilege can be waived by those who are interested in maintaining integrity of will); *Estate of Hebbeler v. Young*, 875 S.W.2d 163, 168 (Mo. Ct. App. 1994) (holding that either party that claims under decedent can waive privileged communications between deceased client and client's attorney); *Walton v. Van Camp*, 283 S.W.2d 493, 499 (Mo. 1955) (same).

A second rationale for the testamentary exception is premised upon the testator's intent. See WIGMORE, *supra* note 2, § 2314, at 612-13; Hood, *supra* note 36, at 765 (discussing intent rationale). The intent rationale presumes that the decedent would want the attorney-client communications revealed to effectuate the wishes contained in the will. See *id.* Consequently, the attorney acts as an agent with authority to make the communications for the deceased client. See *id.*; see also *Doherty v. O'Callaghan*, 31 N.E. 726, 727 (Mass. 1892) (holding that attorney should testify in order for court to ascertain what testamentary instructions were given to attorney by deceased testator); *In re Cunnion's Will*, 94 N.E. 648, 650 (N.Y. 1911) (stating that "after the testator's death, the attorney is at liberty to disclose all that affects the execution and tenor of the will"); *Bergsvik v. Bergsvik*, 291 P.2d 724, 731 (Or. 1955) (stating that "it is presumed that the client wanted every material fact revealed that might aid in giving [the will] effect").

68. See *Glover*, 165 U.S. at 406 (limiting exception to privilege to persons who are devisees under decedent's will).

69. See *id.* (stating that "[w]hile [communications between attorney and deceased client] might be privileged, if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin"). Consequently, the privilege still applies against strangers or outside persons who make claims against the estate. See *id.*

70. 449 U.S. 383 (1981).

71. *Id.* at 395 (extending privilege to cover middle-and lower-level corporate employees). In *Upjohn*, independent accountants conducting an audit of one of Upjohn's subsidiaries discovered that Upjohn officials had made possibly illegal payments to foreign government officials to secure government business. See *id.* at 386. The corporation subsequently sent a questionnaire to "all foreign general and area managers," asking for detailed information concerning such payments. See *id.* at 386-87. The letter, signed by Upjohn's chairman, told the managers that they

reaching this conclusion, Justice Rehnquist recognized that the "attorney-client privilege is the oldest of the privileges for confidential communications known to the common law" and that it applies to individuals as well as corporations.<sup>72</sup> Accordingly, Justice Rehnquist reassured that the privilege promotes "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice."<sup>73</sup> The Court further emphasized that if an attorney is to become fully informed about his or her client's case, the privilege must extend to those persons who possess the information needed by the corporation's lawyers.<sup>74</sup>

The *Upjohn* Court was highly critical of the Sixth Circuit's "control group" test, which protected communications between corporate counsel and those employees who were responsible for directing the corporation's activities.<sup>75</sup> Justice Rehnquist asserted that employees of a corporation who are not in decision-making positions often possess critical informa-

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were to treat the investigation as "highly confidential" and that they were not to discuss the matters with anyone other than Upjohn employees who possibly could be helpful in providing the information requested. *See id.* at 387. Responses were to be sent directly to the company's general counsel. *See id.* After Upjohn voluntarily submitted a preliminary report to the IRS, which disclosed the questionable payments, the IRS immediately began an investigation to ascertain the tax consequences of such payments. *See id.* Upon learning of the existence of the questionnaires, the IRS sought to obtain them by subpoena. *See id.* at 387-88. Upjohn refused to produce the responses to the questionnaires, arguing that they were protected by the attorney-client privilege and the work product doctrine. *See id.* at 388.

One authority deems the *Upjohn* decision a "failure" because the Supreme Court failed to recognize the theoretical and practical problems that emerge when a corporation is treated as a client. *See* WRIGHT & GRAHAM, *supra* note 23, § 5476, at 134-92 (providing extensive discussion of difficulties created when corporations are treated as clients).

72. *See Upjohn*, 449 U.S. at 389-90 (discussing history and applicability of privilege). Justice Rehnquist recognized that difficulties in application of the privilege arise when the client is a corporation. *See id.* at 389. Nevertheless, the Court has already ruled that the privilege applies when the client is a corporation. *See id.* at 390.

73. *Id.* at 389.

74. *See id.* at 391 (recognizing that noncontrol group employees, such as middle- and lower-level employees, often possess information that corporate counsel needs to represent corporation effectively).

75. *See id.* at 391-93 (asserting control group test "frustrates the very purpose of the privilege"). Among one of the Supreme Court's criticisms of the control group test is that it places the attorney in a difficult situation. *See id.* at 391-92 (discussing dilemma faced by corporate attorney). According to the *Upjohn* Court:

"In a corporation, it may be necessary to glean information relevant to a legal problem from middle management or non-management personnel as well as from top executives. The attorney dealing with a complex legal problem 'is thus faced with a "Hobson's choice." If he interviews employees not having "the very highest authority," their communications to him will not be privileged. If, on the other hand, he interviews *only* those employees with the "very highest authority," he may find it extremely difficult, if not impossible, to determine what happened.'"



tion that the corporate counsel needs, and the non-control-group employees often need legal advice themselves.<sup>76</sup> More importantly, Justice Rehnquist asserted that the "control group" test was highly unpredictable because it restricted the availability of the privilege to those employees who have a "substantial role" in deciding and administering a corporation's legal response.<sup>77</sup> According to the Court, to effect the purpose of the attorney-client privilege, both the attorney and the client must have some assurances in advance whether certain discussions will be protected.<sup>78</sup> As Justice Rehnquist stated, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."<sup>79</sup>

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*Id.* at 391-92 (quoting *Diversified Indus. v. Meredith*, 575 F.2d 596, 608-09 (7th Cir. 1978); Alan J. Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege*, 12 B.C. INDUS. & COMMERCIAL L. REV. 873, 876 (1971)).

76. *See id.* (acknowledging lower level employees often possess critical information needed by attorney). The Court was well aware that middle- and lower-level employees can entangle the corporation in serious legal matters. *See id.* at 391 (noting that noncontrol group employees can embroil corporation in substantial legal problems). Consequently, these employees will often have the pertinent information needed by the corporation's counsel to defend the corporation. *See id.* (discussing amount and value of knowledge of lower-level corporate employees).

77. *See id.* at 393 (asserting that control group test is inherently unpredictable). Justice Rehnquist supported this conclusion by citing to several lower court decisions that applied the control group test with varying results. *See id.* The Court cited to *Hogan v. Zletz*, 43 F.R.D. 308, 315-16 (N.D. Okla. 1967), which held that the control group consists of managers and assistant managers of the patent division and research and development department. *See Upjohn*, 449 U.S. at 393. The Court contrasted the *Hogan* court's conclusion with that of *Congoleum Industries v. GAF Corp.*, 49 F.R.D. 82, 83-85 (E.D. Pa. 1969), which found that the control group does not include two directors of the research division or the vice president of research and production. *See Upjohn*, 449 U.S. at 393. Recognizing the seemingly disparate results reached in these two cases, the *Upjohn* Court found the control group test to be unpredictable. *See id.* (discussing lower courts' inability to apply control group test consistently).

One commentator contends that the Supreme Court's conclusion regarding the unpredictability of the control group test is "unfounded." *See The Supreme Court, 1980 Term—Attorney-Client Privilege*, 95 HARV. L. REV. 270, 279 (1981) (criticizing *Upjohn* Court's finding that control group test is unpredictable). This commentator noted: "One cannot prove the unpredictability of a factually based test by using different results reached under different factual situations." *Id.*

78. *See Upjohn*, 449 U.S. at 393 (stating that "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected").

79. *Id.* Although the Court rejected the control group test, it refused to articulate a standard that would govern similar cases and provide guidance to corporations and federal courts. *See id.* at 396. Nevertheless, the opinion does suggest limitations in that the privilege will apply if: (1) the information is communicated for the sole purpose of obtaining legal advice for the corporation; (2) it relates to the specific corporate duties of the employee providing the information; and (3) the information is treated as confidential within the corporation itself. *See McCORMICK*, *supra* note 2, § 87, at 208 (explaining that *Upjohn* did establish guidelines for corporations and lower courts to follow).

The Supreme Court expanded testimonial privileges further in *Jaffee v. Redmond*.<sup>80</sup> In *Jaffee*, the Court considered whether federal courts should recognize a privilege that protects communications between psychotherapists and patients, and whether such a privilege, if recognized, should extend to licensed clinical social workers.<sup>81</sup> Justice Stevens, writing for the majority, concluded that "reason and experience" dictated that a psychotherapist-patient privilege should exist.<sup>82</sup>

Arriving at its conclusion, the *Jaffee* Court noted that Rule 501 of the Federal Rules of Evidence authorizes courts to define new privileges according to common law principles in light of reason and experience.<sup>83</sup> The Court maintained that Rule 501 did not freeze the law governing privileges of witnesses in federal trials as it existed at the time of the rule's creation, but rather Rule 501 instructed the federal courts to "continue the evolutionary development of testimonial privileges."<sup>84</sup> Akin to its rea-

80. 116 S. Ct. 1923 (1996).

81. *Id.* at 1928 (stating that issue is whether privilege protecting communications between patient and psychotherapist "promotes sufficiently important interests to outweigh the need for probative evidence" (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980))).

82. *Id.* The Court recognized that the privilege poses a barrier to the truth finding process. *See id.* at 1928-29 (noting that privilege impedes public's right to evidence). Nevertheless, the Court concluded that a psychotherapist-patient privilege serves a valid public interest and that its existence should be recognized by the federal courts. *See id.* at 1929 (concluding that psychotherapist privilege serves public interest by providing appropriate treatment for persons suffering effects of mental or emotional problems). As one commentator surmised, the *Jaffee* Court's recognition of a psychotherapist privilege signified that the Court was willing to ensure the confidentiality of communications between psychotherapists and patients at the cost of losing additional relevant evidence. *See* Molly Rebecca Bryson, *Protecting Confidential Communications Between a Psychotherapist and Patient: Jaffee v. Redmond*, 46 CATH. U. L. REV. 963, 987-88 (1997).

The Court also concluded that this privilege should extend to licensed social workers because such professionals provide psychiatric assistance to those who cannot afford the services of a psychiatrist or psychologist. *See Jaffee*, 116 S. Ct. at 1931 (arguing that counseling sessions provided by licensed social workers serve same public goals as those provided by psychotherapists). Specifically, the Court maintained that "[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." *Id.* at 1932 (quoting *Jaffee v. Redmond*, 51 F.3d 1346, 1358 n.19 (1995), *aff'd*, 116 S. Ct. 1923 (1996)).

83. *See Jaffee*, 116 S. Ct. at 1927. Rule 501 provides in pertinent part:

Except as otherwise provided by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the courts of the United States in the light of reason and experience.

FED. R. EVID. 501.

84. *Jaffee*, 116 S. Ct. at 1927-28 (citing *Trammel v. United States*, 445 U.S. 40, 47 (1980)). In *Trammel*, the Court stated that Congress did not intend to freeze the law of privilege, but rather Congress' purpose was to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." *Trammel*, 445 U.S. at 47.

soning in *Upjohn*, the *Jaffee* Court asserted that the privilege does not place the adversary at a disadvantage, because if the privilege did not exist, there would be a chilling effect on confidential communications between psychotherapists and their patients.<sup>85</sup> This chilling effect, in the eyes of the *Jaffee* Court, would likely thwart the very existence of the evidence being sought.<sup>86</sup>

The recognition that state policy decisions influence whether federal courts should recognize a new privilege or alter the coverage of an existing one was central to the *Jaffee* Court's holding.<sup>87</sup> According to Justice Stevens, the fact that all fifty states and the District of Columbia had enacted statutes recognizing some form of psychotherapist privilege made it appropriate for the Court to recognize a federal psychotherapist privilege.<sup>88</sup>

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85. See *Jaffee*, 116 S. Ct. at 1929 (stating that "[i]f the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation"). But see *United States v. Nixon*, 418 U.S. 683, 712 (1974) (stating that "we cannot conclude that [the President's] advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution").

The *Jaffee* Court continued the "evolutionary development of testimonial privileges" by noting that effective psychotherapy is contingent upon an atmosphere of confidence and trust. See *Jaffee*, 116 S. Ct. at 1928-29 (arguing that confidentiality is essential to effective psychiatric treatment). The Court maintained that an atmosphere of trust and confidence must exist for a patient to make a full disclosure of potentially embarrassing information. See *id.* at 1928. The Court thus concluded that confidentiality is a "*sine qua non* for successful psychiatric treatment." *Id.* (citing Judicial Conference Advisory Committee's Note, 56 F.R.D. 183, 242 (1972)). For a discussion of whether the attorney-client privilege ensures a client's openness and candor, see *supra* note 30.

86. See *Jaffee*, 116 S. Ct. at 1929 (contending that without privilege much of evidence sought by plaintiffs would likely not have come into existence). In a harsh dissent, Justice Scalia argued that the role of psychotherapists in modern society does not justify creation of a specific psychotherapist-patient privilege. See *id.* at 1934 (Scalia, J., dissenting) (asserting that most individuals resolve difficulties at home with family members and noting no existence of mother-child privilege, yet there now exists psychotherapist-patient privilege). Justice Scalia also noted that the absence of such a privilege did not preclude patients in previous years from being candid with their psychotherapists. See *id.* at 1935 (Scalia, J., dissenting) (questioning whether "patients [were] paying money to lie to their analysts all those years" before adoption of privilege).

87. See *id.* at 1929-31 (noting that policy decisions of states have influenced Court in deciding to recognize new privilege or modify coverage of existing privilege).

88. See *id.* at 1929 (maintaining that adoption of psychotherapist-patient privilege by all 50 states and District of Columbia confirms appropriateness of federal courts adopting privilege as well). Justice Stevens further argued that if the Court failed to recognize the privilege, any state's promise of confidentiality might be rendered worthless if the case reached federal court. See *id.* at 1930 (noting that recognition of privilege by all 50 states further strengthened Court's desire to avoid frustrating purposes of state legislation that was enacted to foster confidential communications).

Also fundamental to the *Jaffee* Court's decision was its outright rejection of a balancing test approach that weighed the evidentiary need for the information against a patient's privacy interests.<sup>89</sup> Emphasizing that such an approach was unpredictable, Justice Stevens cited the Court's holding in *Upjohn* to support the conclusion that an application of such a balancing test would "eviscerate the effectiveness of the privilege."<sup>90</sup>

### III. THE FACTS OF *IN RE SEALED CASE*

On May 19, 1993, the White House carried out its controversial decision to fire seven employees in the Travel Office.<sup>91</sup> Vincent W. Foster,

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89. See *id.* at 1932 (contending that purpose of privilege would be thwarted if confidentiality was premised upon trial judge's later evaluation of relative importance of patient's privacy interests and evidentiary need for disclosure). But see *Nixon*, 418 U.S. at 711-12 (applying balancing test in executive privilege case to determine if public's need for evidence outweighs President's need to have general privilege of confidentiality over his Presidential communications). In *Nixon*, the Special Prosecutor filed a motion for a subpoena *duces tecum* that required the resident to produce certain tapes and documents concerning the President's conversations with his aides and advisors. See *id.* at 688. The President claimed executive privilege and filed a motion to quash the subpoena. See *id.* at 688. The district court denied the President's motion and ordered the President or any subordinate official in possession of the subpoenaed materials to deliver the materials to the district court. See *id.* at 688-89.

In affirming the district court's holding, the Supreme Court stated that communications between the President and his advisers are protected by a privilege that emanates from separation of powers principles. See *id.* at 705 (stating that "the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties"). The Court noted, however, that the privilege was not absolute, but qualified, and therefore it "must yield to the demonstrated, specific need for evidence in a pending criminal trial." *Id.* at 713. In arriving at this conclusion, the *Nixon* Court applied a balancing test in which the Court "weigh[ed] the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice." *Id.* at 711-12.

90. See *Jaffee*, 116 S. Ct. at 1932. The *Jaffee* Court emphasized its holding in *Upjohn* that if the purpose of the privilege is to be effectuated, the participants in the conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

91. See *Hearings Relating to Madison Guaranty S&L and the Whitewater Development Corporation—Washington, DC Phase: Hearings Before the Committee on Banking, Housing, and Urban Affairs*, 103d Cong. 186 (1994) [hereinafter *Madison Guaranty Hearings*] (discussing circumstances behind Travel Office firing incident). Efforts began shortly after the 1992 Presidential election to remove the long-standing White House Travel Office employees. See H.R. REP. NO. 104-849, at 11 (1996) (discussing events leading up to Travel Office firings). President Clinton's cousin, Catherine Cornelius, who had previously worked on travel arrangements during the election campaign, contacted an Arkansas travel company, World Wide Travel, in an effort to promote "out-sourcing" the travel operations at the White House. See *id.* Before January 20, 1993, Cornelius met several times with White House Administrator David Watkins and World Wide Travel representatives and submit-

Deputy White House Counsel, was a central figure behind the Travel Office affair.<sup>92</sup> In the weeks that followed the firings, Foster became increasingly troubled by the Travel Office matter.<sup>93</sup> Concerned that he might

ted several memos to Watkins regarding future travel arrangements. *See id.* In her memos, Cornelius argued that the Travel Office was badly mismanaged and "overly pro-press," and she asserted that she be named to head the office. *See* JAMES B. STEWART, *BLOOD SPORT* 259-60 (1996) (discussing Cornelius' contentions). Harry Thomason, a childhood friend of the President and an owner of an air charter consulting company that had provided travel services to the Clinton-Gore campaign, also alleged mismanagement and corruption in the Travel Office. *See* H.R. REP. 104-849, at 11 (discussing President Clinton's long-standing relationship with Thomason). Early in 1993, Thomason told the President and Mrs. Clinton of alleged wrongdoings in the Travel Office, arguing that the long-time career Travel Office employees "should be replaced because they were disloyal." *Id.*

In mid-May 1993, after repeated allegations of mismanagement and corruption in the Travel Office, the White House ordered an FBI investigation as well as an audit by an outside accounting firm to uncover any wrongdoings within the Travel Office. *See Madison Guaranty Hearings, supra*, at 186-87 (discussing audit and FBI investigation). Following a preliminary report by the accounting firm, the White House proceeded to fire the employees. *See id.* at 187.

Evidence now supports that the Travel Office firings were not the result of corruption by Travel Office employees, but rather the firings were part of an extensive campaign payback scheme. *See* H.R. REP. NO. 104-849, at 28-88 (concluding that Travel Office firings were motivated by cronyism). The Travel Office affair generated a wave of negative publicity for the Clinton White House. *See, e.g.,* Ann Devroy & Ruth Marcus, *Clinton Friend's Memo Sought Business; President's Cousin Proposed Staffing Travel Office with Loyalists*, WASH. POST, May 22, 1993, at A1 (contending that White House had ulterior motives in firing Travel Office staff); *White House Follies: The Gang That Can't Fire Straight*, N.Y. TIMES, May 22, 1993, at 18 (stating that Travel Office firings made White House look "inept, callous and self-serving").

92. *See* STEWART, *supra* note 91, at 258-78 (discussing Foster's role in handling Travel Office firings). Before coming to Washington, Vincent Foster was a partner in the Rose Law Firm. *See Madison Guaranty Hearings, supra* note 91, at 185 (discussing Foster's background). Among his partners at the Arkansas firm were Associate Counsel William Kennedy and First Lady Hillary Rodham Clinton. *See id.* Although Foster gave Associate Counsel William Kennedy direct control over the Travel Office matter, Foster was responsible for overseeing the overall operation. *See id.* at 187 (discussing Foster's role as supervisor). After consulting with Foster and others within the White House, Kennedy hired an outside accounting firm to audit the books of the Travel Office, and he also contacted the Federal Bureau of Investigations (FBI) to determine whether a criminal investigation should take place. *See id.*

In the days following the firings, the White House sought to make the FBI issue a stronger statement about its investigation. *See* STEWART, *supra* note 91, at 266 (discussing FBI investigation). In accordance with its standard policies, the FBI was preparing to issue a statement that read: "We understand that the results of the audit of the White House Travel office will be referred to the FBI for our review." *Id.* The White House, without any objections from Foster, persuaded the FBI to add a sentence to its statement saying that there was "sufficient information for the FBI to determine that additional criminal investigation is warranted." *Id.* The White House was subsequently criticized for its interference with an FBI investigation. *See id.* (citing newspaper articles castigating White House for its mishandling of FBI investigation into Travel Office fiasco).

93. *See* H.R. REP. NO. 104-849, at 109-21 (noting that Foster was very troubled by prospect of numerous congressional and criminal investigations into Travel Of-

have acted illegally in his handling of the incident, Foster hired his own attorney.<sup>94</sup> Portions of their conversations concerned Foster's involve-

face firings). Foster's distress became so severe that he considered resigning from his position. See *Madison Guaranty Hearings*, *supra* note 91, at 189.

Foster had become so upset about his involvement in the Travel Office firings that he suffered an anxiety attack. See *id.* at 187. According to Foster's wife, "the Travel Office matter was the greatest cause of Foster's stress and anxiety in the weeks prior to his death." *Id.* Foster also felt personally responsible for the White House's reprimand of Associate Counsel Kennedy for his handling of the Travel Office fiasco and considered resigning from his post as Deputy White House Counsel. See *id.* at 187-88.

94. See STEWART, *supra* note 91, at 273 (stating that Foster's notes "suggest he was beginning to worry that he might even have violated some law"). Foster was also deeply troubled that the criminal investigation into the Travel Office firings could implicate President and Mrs. Clinton. See H.R. REP. 104-849, at 110. On June 1, 1993, the FBI submitted its investigation report to the Attorney General. See *Madison Guaranty Hearings*, *supra* note 91, at 187. The report contained statements allegedly made by Associate Counsel Kennedy to FBI agents that the Travel Office matter concerned those at "the highest levels" and "the highest level" at the White House. H.R. REP. NO. 104-849, at 110. Kennedy repeatedly denied making such statements. See *id.* According to White House sources, Foster argued in vain to exclude these statements from the White House Travel Office Management Review because such statements opened the possibility that both Mrs. Clinton and the President played a role in the firings. See *id.* (discussing Foster's distress at possible implications for President and Mrs. Clinton).

Before the Travel Office firings, Foster met with Mrs. Clinton and the two discussed how to handle the situation in the Travel Office. See STEWART, *supra* note 91, at 261. Foster's notes of the meeting indicate that Mrs. Clinton was interested in the Travel Office matter: "What's going on? Are you [Foster] on top of it?" *Id.* Mrs. Clinton has repeatedly denied that she suggested that the Travel Office staff be replaced. See *id.* at 262 n.\* (noting that Mrs. Clinton asserts she was not responsible for firing of Travel Office staff). Contained in Foster's handwritten notebook detailing the Travel Office affair are references to Mrs. Clinton and statements such as "misuse of FBI" followed by "they deny" and "HR no role." H.R. REP. NO. 104-849, at 111. Consequently, Foster may have been worried that Mrs. Clinton might become involved in the "misuse of the FBI" issue. See *id.* (discussing Foster's concerns about investigations into Hillary Clinton's possible involvement in misuse of FBI). Foster was so concerned about the potential ramifications of the Travel Office firings that he considered getting outside counsel for both President and Mrs. Clinton. See *id.* at 109.

Foster was also highly concerned about controlling potential damage to the Clintons from Whitewater. See *Investigation of Whitewater Development Corporation and Related Matters: Final Report of the Special Committee to Investigate Whitewater Development Corporation and Related Matters*, S. REP. NO. 104-280, at 23-33 (1996) [hereinafter *Whitewater Hearings*] (discussing Foster's involvement in Clintons' personal legal affairs). Whitewater was a failed land development deal entered into by the Clintons and their partners James and Susan McDougal in which the Clintons lost more than \$46,000 by the time they sold their interest to McDougal for \$1000 in 1992. See Macon Morehouse, *Whitewater: A Primer; The Who, What, Why of a Tangled Scandal; The Real Estate Deal*, ATLANTA J. & CONST., May 30, 1996, at A14 (providing overview of participants and events behind Whitewater real estate development plan); see also *Navigating the Maze: Whitewater*, CHI. SUN TIMES, June 2, 1996, at 27 (same); *The Unfolding of Whitewater*, WASH. POST, Jan. 21, 1994, at A20 (same).

Foster was given the responsibility for overseeing the preparation of the Clintons' 1992 tax returns to reflect properly the sale of their shares in Whitewater, and he was worried that the returns might trigger an IRS audit. See *Whitewater*

ment in the Travel Office firings and the decision to order a criminal investigation into the Travel Office staff.<sup>95</sup> Two months after the dismissal of the Travel Office employees, Foster was found dead in a park outside of Washington, D.C., the victim of an apparent suicide.<sup>96</sup>

In the grand jury investigation into the White House Travel Office firings, the Office of the Independent Counsel subpoenaed the notes that Foster's attorney took during his conversation with Foster shortly before Foster's suicide.<sup>97</sup> The United States District Court for the District of Columbia quashed the subpoenas on the grounds that the notes of the conversation were protected by both the attorney-client privilege and the

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*Hearings, supra*, at 28 (discussing Foster's role in preparing Clintons' tax returns). Among the documents found in Foster's office at the time of his death was a file on Whitewater and his notes of conversations with the Clintons' accountant concerning the tax treatment of the sale of Whitewater. *See id.* at 25-29 (discussing contents of Foster's office). Foster's notes stated that the Whitewater tax problem was a "can of worms you shouldn't open." *Id.* at 28.

95. *See* Stephen Labaton, *Foster Suicide a Test of Lawyer-Client Privilege*, N.Y. TIMES, Nov. 3, 1997, at A17 (stating that Foster's friends and associates say that at least part of conversation between Foster and his attorney involved issue of Travel Office firings).

96. *See* Madison Guaranty Hearings, *supra* note 91, at 182. Foster apparently shot himself in the head in Fort Marcy Park during the early evening of July 20, 1993. *See id.* at 183.

Foster's death has sparked a wave of literature among some observers who contend that Foster was not the victim of a suicide, but rather the victim of a White House cover-up. *See, e.g.*, Reed Irvine & Joe Goulden, *Unremitting Trail of Clues in the Foster Suicide*, WASH. TIMES, Dec. 11, 1993, at D3 (questioning whether Foster committed suicide); Ellen Joan Pollock, *Vince Foster's Death Is a Lively Business for Conspiracy Buffs*, WALL ST. J., Mar. 23, 1995, at A1 (discussing market created by conspiracy buffs who believe Foster was murdered). *See generally* CHRIS RUDDY, *THE STRANGE DEATH OF VINCENT FOSTER* (1997) (contending Foster may have been murdered). The secrecy of White House officials and the removal of objects from Foster's office immediately following his death increased suspicions that Foster's death was not a suicide. *See* H.R. REP. NO. 104-849, at 121-86 (charging that White House officials were responsible for cover-up and obstruction of justice after Foster's apparent suicide).

Despite the controversy, several different independent investigations each have concluded that Foster's death resulted from suicide. *See, e.g.*, *Madison Guaranty Hearings, supra* note 91, at 171-380 (concluding Foster committed suicide); *Laying Mr. Foster to Rest*, N.Y. TIMES, Oct. 13, 1997 (stating that Office of Independent Counsel has finished latest report concluding Foster committed suicide).

97. *See In re Sealed Case*, 124 F.3d 230, 231 (D.C. Cir. 1997) (stating that Office of Independent Counsel sought notes of conversation between Foster and his attorney). Around late May or early June of 1993, Foster contacted his own attorney out of his concern that he might have to testify before a congressional committee regarding the Travel Office affair. *See* STEWART, *supra* note 91, at 273 (stating that "Foster's notebook jottings in some cases appear to be preparation for congressional cross-examination").

work-product doctrine.<sup>98</sup> On appeal by the Office of the Independent Counsel, the D.C. Circuit reversed.<sup>99</sup>

#### IV. ANALYSIS

##### A. Narrative Analysis

###### 1. *The Majority Opinion*

In *In re Sealed Case*, the D.C. Circuit addressed the issue of whether the attorney-client privilege terminates upon the death of the client.<sup>100</sup> First, the majority opinion, written by Judge Williams, noted that the attorney-client privilege applies to grand jury proceedings.<sup>101</sup> The majority then referred to Rule 501 of the Federal Rules of Evidence which states that the attorney-client privilege must be construed "in the light of reason and experience."<sup>102</sup>

Having discussed the need to refer to precedent, the D.C. Circuit recognized that the prevailing rule is that the privilege survives the death of the client.<sup>103</sup> The majority noted, however, that the vast majority of cases in which the privilege applied were cases that fell within the well-recognized testamentary exception.<sup>104</sup> Acknowledging the scarcity of nontestamentary cases involving the privilege, the majority asserted that the nontestamentary cases that actually applied the privilege provide little explanation as to why the privilege applied.<sup>105</sup> Moreover, the majority noted

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98. *See Sealed Case*, 124 F.3d at 231 (stating that United States District Court for District of Columbia applied attorney-client privilege incorrectly).

99. *See id.* (reversing and remanding for further proceedings on grounds that "the district court read both privileges too broadly").

100. *See id.* at 231-32 (addressing applicability of privilege in postdeath situations). The court also addressed the issue of whether the work-product doctrine protected the notes of the conversation between the decedent and his attorney. *See id.* at 235-37. For a discussion of the court's examination regarding the work-product doctrine see *infra* note 117.

101. *See id.* at 231 (discussing whether privilege applied to grand jury proceedings). The parties both agreed that the communications in question would be protected if the client were still living. *See id.*

102. *Id.* (quoting FED. R. EVID. 501). The court maintained that Rule 501 obligates courts to "observe[ ] precedent but at the same time try[ ], where precedents are in conflict or not controlling, to find answers that best balance the purposes of the relevant doctrines." *Id.*

103. *See id.* (stating that "[c]ourts have generally assumed that the privilege survives death" and citing Frankel, *supra* note 11, at 47). The majority also cited to modern evidence codes that permit personal representatives of a deceased client to assert the privilege. *See id.* (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmt. c (Proposed Final Draft 1996)). The court further recognized that courts applied the privilege after the client's death in both grand jury proceedings and criminal trials. *See id.*

104. *See id.* (citing Frankel, *supra* note 11, at 58 n.65). Of 400 cases examined, 380 were cases involving testamentary disputes. *See id.* (providing statistics of cases in which courts upheld attorney-client privilege after client's death).

105. *See id.* at 232 (asserting that "such cases as do actually apply [the privilege] give little revelation of whatever reasoning may have explained the out-



that most commentators support curtailing the privilege in cases in which the client is deceased.<sup>106</sup>

The D.C. Circuit then focused its analysis on the policy rationale for the privilege.<sup>107</sup> Judge Williams recognized that the privilege serves two functions: (1) it facilitates the provision of legal advice and (2) it ensures the client's privacy.<sup>108</sup> Nevertheless, the majority found that the privilege hindered the truth-finding process and, therefore, must be construed narrowly.<sup>109</sup> Acknowledging that a complete abandonment of the privilege would impair the provision of legal services, the majority proposed that a balancing test be used to determine the applicability of the privilege in postdeath criminal cases.<sup>110</sup>

Employing this balancing test, the D.C. Circuit weighed the decedent's interest in preserving his reputation against the costs of protecting

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come"). The majority criticized the rationale in *Glover v. Patten*, which is generally cited for the proposition that the privilege survives death. *See id.* (contending *Glover* is typical case that merely proposes that privilege survives death of client, but finds it inapplicable to conflicts among persons "claiming under the client"). The D.C. Circuit noted that the *Glover* Court's endorsement of the privilege in nontestamentary situations was "rather tepid." *Id.* For a discussion of the Supreme Court's reasoning in *Glover*, see *supra* notes 64-69 and accompanying text.

The court also noted that "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged." *Sealed Case*, 124 F.3d at 231 (quoting CAL. EVID. CODE § 954 cmt. (1997)). The court reasoned that the framing of the privilege as belonging to the deceased client's estate or personal representative indicates that the privilege may cease on the winding up of the estate and reflects a primary focus on civil litigation. *See id.* (discussing limitations of privilege in testamentary situations).

106. *See Sealed Case*, 124 F.3d at 231 (citing examples of scholarly comment that generally support curtailment of postdeath privilege). The majority stated that only one commentator contended that there was "no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate." *Id.* (quoting WIGMORE, *supra* note 2, § 2323, at 630-31). This view, however, has been sharply criticized by other legal scholars, including some who assert that "[o]ne would have to attribute a Pharaoh-like concern for immortality to suppose that the typical client has much concern for how posterity may view his communications." *Id.* (quoting WRIGHT & GRAHAM, *supra* note 23, § 5498, at 484).

107. *See id.* at 233 (discussing justifications for privilege).

108. *See id.* (discussing utilitarian and privacy rationales for privilege). The court asserted, however, that "it seems fair to say that [privacy concerns] have played at best a secondary role" in establishing the privilege. *Id.*

109. *See id.* (stating that "because the privilege obstructs the truth-finding process, it is . . . to be narrowly construed").

110. *See id.* (proposing application of balancing test). The court noted that the goal of the privilege is to maximize the benefits of confidential communications between clients and attorneys, while simultaneously maximizing the truth-seeking process. *See id.* The majority recognized further, however, that an abrogation of the privilege would "clearly impair the provision of legal services," but at the same time "its application renders judicial proceedings less accurate." *Id.*

the decedent's communications after his death.<sup>111</sup> The majority concluded that in the realm of criminal litigation, the chilling effect would fall "somewhere between modest and nil" if the privilege were to be abrogated.<sup>112</sup> The proposition that postdeath revelations typically trouble the client less than predeath revelations was central to the majority's reasoning.<sup>113</sup>

Cognizant of the Supreme Court's holding in *Jaffee*, the majority limited their application of the balancing test solely to criminal litigation.<sup>114</sup> The majority asserted that a balancing test creates only "incremental complication," and that the attorney-client privilege has never been free from complication because it is not absolute.<sup>115</sup> To support this assertion, the majority cited several exceptions, including the crime-fraud exception, the intentional tort exception and the testamentary exception to the privilege.<sup>116</sup> Finally, the D.C. Circuit concluded that the balancing test should

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111. *See id.* (employing balancing test to determine if decedent's interests justify maintaining privilege).

112. *Id.* The D.C. Circuit contended that postdeath revelation would normally trouble the client less than predeath revelation, but the question depends on how much less. *See id.* (arguing that client's posthumous reputation was of relatively little importance to him). The majority determined that the answer is contingent upon the circumstances. *See id.* As such, according to the majority, criminal liability dies with the client, but civil liability continues, and "the same impulses that drive people to provide for their families in life clearly create a motive to preserve their estates thereafter." *Id.*

113. *See id.* (discussing value of decedent's posthumous reputation). The D.C. Circuit recognized that one's posthumous reputation will affect the decedent's family, but the majority reasoned that "[i]n the sort of high-adrenalin situation likely to provoke consultation with counsel, however, we doubt if these residual interests will be very powerful; and against them the individual may even view history's claims to truth as more deserving." *Id.* For a discussion favoring abrogation of the attorney-client privilege in postdeath situations for the benefit of history, see Bonnie Hobbs, *Lawyers' Papers: Confidentiality Versus the Claims of History*, 49 WASH. & LEE L. REV. 179 (1992).

114. *See Sealed Case*, 124 F.3d at 234 (discussing limited application of balancing test). The court opined that "the fewer, and the more questionable the remaining resources (because of witnesses' interest or bias, for example), the greater the relative value of what the deceased has told his lawyer." *Id.* Recognizing the Supreme Court's admonition in *Jaffee* against employing a balancing test that yields varied results, the court restricted its holding, stating:

Although witness unavailability alone would not justify qualification of the privilege, we think that unavailability through death, coupled with the non-existence of any client concern for criminal liability after death, creates a discrete realm (use in criminal proceedings after death of the client) where the privilege should not automatically apply. We reject a general balancing test in all but this narrow circumstance.

*Id.*

115. *See id.* (noting that many communications which clients and lawyers believe to be privileged in fact are not) (citing EDNA S. EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE* 3 (1997)).

116. *See id.* at 234-35 (discussing various exceptions to privilege). The court noted that the privilege does not extend in cases in which the client seeks legal advice to consummate a future illegal activity. *See id.* at 234. The court also indicated that the exception does not apply when a client commits intentional torts.

be used only in criminal proceedings in which the importance of the communications sought is substantial.<sup>117</sup>

## 2. *The Dissent*

Judge Tatel, in his dissent, strongly criticized the majority for its failure to provide sufficient reasoning in abandoning a privilege that courts

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*See id.* The majority also discussed the exception for litigation between persons who claim under the decedent, and noted that in many contexts the privilege would not apply because it would be readily apparent at the outset of the attorney-client communication whether the privilege applied. *See id.* (discussing inapplicability of privilege in certain testamentary situations).

117. *Id.* at 235. The majority emphasized that the statements at issue “must bear on a significant aspect of the crimes at issue” and an aspect as to which there is little reliable evidence available. *Id.* The D.C. Circuit reasoned that this approach would limit release to when the risk of a chilling effect is minimal and the cost of keeping such communications secret would be high. *See id.*

The majority also suggested that an in camera review by the district court of the communications at issue should play a role in the application of the balancing test. *See id.* (proposing that district court should use its discretion in examining communications to see if they qualify for privileged status); *see also* *United States v. Zolin*, 491 U.S. 554, 562-75 (1989) (holding that in camera review of allegedly privileged communications may be used to ascertain whether communications fall within crime-fraud exception to privilege); *United States v. Nixon*, 418 U.S. 683, 714-15 (1974) (ordering in camera review of Presidential communications to preserve confidentiality). The D.C. Circuit noted that if the district court finds a confidentiality interest, “it can take steps to limit access to these communications in a way that is consonant with the analysis justifying relaxation of the privilege.” *Sealed Case*, 124 F.3d at 235.

In deciding on the work-product doctrine, the D.C. Circuit drew a distinction between an attorney’s notes that contained purely factual elements and notes that revealed the attorney’s opinions and thought processes. *See id.* at 235-36. The majority recognized that forcing an attorney to disclose notes about a client’s oral statements is disapproved of by the courts because it “tends to reveal the attorney’s mental processes.” *Id.* at 236 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 399 (1981)). Consequently, the person who seeks such notes must show “extraordinary justification.” *Id.* at 235. The majority noted further, however, that *Upjohn* did not establish whether the factual elements contained in the attorney’s notes should be granted the nearly absolute “extraordinary justification.” *Id.* at 236 (contending that the reasoning in *Upjohn* suggests that such notes are analytically divisible).

The court in *Sealed Case* thus concluded that unless the factual material reflects the attorney’s mental processes, the material should be obtainable by the other party when true necessity is shown. *See id.* The court stated that

unless the general possibility that purely factual material may reflect the attorney’s mental processes (either in questioning or in recording) is enough to shroud all lawyers’ notes in the super-protective envelope reserved by Rule 26(b)(3) [of the Federal Rules of Civil Procedure] for ‘mental impressions,’ we think such material should be reachable when true necessity is shown.

*Id.*

Based on the evidence before it, the court concluded that the work-product exception did not apply to the documents in their entirety. *See id.* at 236-37 (contending that documents in question disclose portions containing factual material that could be considered opinion only through an overly-expansive view of work-product privilege).

had widely recognized for centuries.<sup>118</sup> The dissent's articulated rationale for the privilege was that "[b]y preserving the privilege after the client's death, the law ensures that the privacy afforded those who confide in counsel extends to those who would otherwise take their secrets to the grave."<sup>119</sup> Furthermore, Judge Tatel stated that the majority's balancing test was not supported by case law, but instead by commentators whose views have never been adopted by any court or legislature.<sup>120</sup> According to the dissent, the majority's new balancing test will dissuade clients from disclosing sensitive and potentially harmful information to their attorneys.<sup>121</sup>

The dissent further noted that when the attorney-client privilege applies, it is not a qualified privilege and cannot be defeated by a showing of need.<sup>122</sup> Moreover, "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the [client's] interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."<sup>123</sup> Judge Tatel further criti-

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118. *See id.* at 237 (Tatel, J., dissenting) (arguing that majority provides no convincing reason for abrogation of privilege and noting privilege was deeply rooted in English and American legal traditions).

119. *Id.* at 238 (Tatel, J., dissenting). Judge Tatel asserted that the privilege encourages individuals to seek legal advice, and by doing so, the individual, the legal system and society benefit. *See id.* (Tatel, J., dissenting) (discussing utilitarian justification for attorney-client privilege). As the dissent stated:

"The subjective freedom of the client, which it is the purpose of the privilege to secure . . . could not be attained if the client understood that, when the relation ended or even after the client's death, the attorney could be compelled to disclose the confidences, for there is no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate."

*Id.* (Tatel, J., dissenting) (quoting WIGMORE, *supra* note 2, § 2323, at 630-31).

120. *See id.* at 239 (Tatel, J., dissenting). The dissent also asserted that although the court relied on the *Restatement (Third) of the Law Governing Lawyers*, the majority failed to acknowledge the Restatement's admonition that "'no court or legislature has adopted'" a posthumous exception to the common law rule. *Id.* (Tatel, J., dissenting) (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 127 cmt. d (Proposed Final Draft 1996)).

121. *See id.* (Tatel, J., dissenting) (discussing chilling effect majority's balancing approach will have on attorney-client communications).

122. *See id.* at 239-40 (Tatel, J., dissenting) (contending clients need to know with some degree of certainty when privilege applies). Judge Tatel asserted that "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Id.* at 239 (Tatel, J., dissenting) (quoting *Upjohn*, 449 U.S. at 393).

123. *Id.* at 240 (Tatel, J., dissenting) (quoting *Jaffee v. Redmond*, 116 S. Ct. 1923, 1932 (1996)). Judge Tatel opined that the testamentary exception and the crime-fraud exception mentioned by the majority differ greatly from the balancing test adopted by court. *See id.* at 240 (Tatel, J., dissenting). According to Judge Tatel, in these two situations the clients are aware at the outset of the meeting that the statements they make are unprotected by the privilege. *See id.* (Tatel, J., dissenting) (distinguishing testamentary and crime-fraud exceptions). Furthermore, an attorney cannot foresee whether a client's statement might some day pertain to a criminal investigation, much less whether a court employing the balancing test

cized the majority for its failure to acknowledge the potential significance of posthumous revelations of confidences on an individual's reputation.<sup>124</sup> Specifically, he argued that the majority's assumption of the irrelevance of one's posthumous reputation "defies both common sense and experience."<sup>125</sup>

Judge Tatel also emphasized that although the privilege may result in loss of information, the common law has long recognized that the legal system benefits from the recognition of the privilege after the client's death.<sup>126</sup> These benefits outweigh whatever detriment might result from denying information to the fact finder in a particular case.<sup>127</sup> The dissent also chastised the court for its failure to recognize the viability of the common law rule in the states.<sup>128</sup> In concluding his dissent, Judge Tatel de-

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will decide at some later date that the information "bear[s] on a significant aspect of the crimes at issue." *Id.* (Tatel, J., dissenting) (citation omitted). Consequently, according to the dissent, the majority's balancing test is precisely the type of nebulous strategy that the Supreme Court was seeking to avoid in *Jaffee* and *Upjohn*. See *id.* (Tatel, J., dissenting).

124. See *id.* (Tatel, J., dissenting) (arguing that rationale of common law recognizes that clients are greatly concerned about their posthumous reputations).

125. *Id.* (Tatel, J., dissenting). Judge Tatel noted that libraries, charitable foundations, schools, universities, scholarships, sports arenas and even acts of Congress bearing the names of their benefactors, authors, or sponsors all stand as a testament to the fact that individuals are greatly concerned about their posthumous reputations. See *id.* (Tatel, J., dissenting) (examining various situations illustrating people's concern for their posthumous reputations). Moreover, that people write wills, purchase life insurance, convey property, finance their children's education and make guardianship arrangements indicates that human beings care deeply about their surviving friends and family. See *id.* (Tatel, J., dissenting) (discussing various safeguards that individuals create during their lifetime to provide for welfare of their loved ones). Judge Tatel asserted that limiting the privilege after a client's death will adversely affect the decisions of not only those persons who have a significant interest in their posthumous reputation, but also of persons who are aged, seriously ill or suicidal. See *id.* (Tatel, J., dissenting) (recognizing that people other than those who are deeply concerned about their reputations may be adversely affected by abrogation of privilege). The dissent declares further that the facts of the instant case are proof of the value that a person can place on reputation. See *id.* at 241 (Tatel, J., dissenting) (stating that "[t]he facts of the present case vividly illustrate the value a person can place on reputation").

126. See *id.* at 241 (Tatel, J., dissenting) (noting that common law "long ago determined that the benefits the legal system gains through recognizing the privilege posthumously outweigh whatever damage might flow from denying information to the factfinder in a particular case").

127. See *id.* (Tatel, J., dissenting) (discussing benefits that application of privilege in postdeath situations provide to legal system). The dissent proposed that if limiting the scope of the privilege deters candor and openness in attorney-client communications, it is possible that much of the information that the other side seeks would not have come into being in the first place. See *id.* (noting that "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being" (quoting *Jaffee*, 116 S. Ct. at 1929)).

128. See *id.* at 242 (Tatel, J., dissenting) (criticizing court's failure to consider state common law rule that privilege survives death of client). The dissent noted that "[i]t is appropriate to treat a consistent body of policy determinations by state

clared that the majority's balancing test "strikes a fundamental blow to the attorney-client privilege and jeopardizes its benefits to the legal system and society."<sup>129</sup>

### B. Critical Analysis

In *Sealed Case*, the D.C. Circuit failed to recognize the importance of preserving the attorney-client privilege after the client's death. Although the D.C. Circuit acknowledged that a wholesale abrogation of the privilege would have deleterious effects on the legal system, the majority nonetheless proceeded to apply the type of balancing test that the *Jaffee* Court prohibited.<sup>130</sup> Moreover, in carving out its new exception to the privilege, the D.C. Circuit disregarded long-standing state law traditions that apply the privilege posthumously.<sup>131</sup> Consequently, the D.C. Circuit's holding in *Sealed Case* was a misguided attempt to create a new exception to an ancient privilege.<sup>132</sup>

#### 1. The Balancing Test Applied

The balancing test set forth by the D.C. Circuit contravenes the principles underlying the attorney-client privilege.<sup>133</sup> According to the Supreme Court in *Upjohn*, for the attorney-client privilege to serve its purpose, "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected."<sup>134</sup> The balanc-

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legislatures as reflecting both 'reason' and 'experience.'" *Id.* (Tatel, J., dissenting) (quoting *Jaffee*, 116 S. Ct. at 1930). Judge Tatel added that the adoption of the common law rule regarding the postdeath survival of the privilege by the Supreme Court's Advisory Committee, and the committees that drafted the *Model Code of Evidence* and the *Uniform Rules of Evidence* further supports the position that the common law rule of the states should have been adopted by the majority in the present case. *See id.* (Tatel, J., dissenting) (discussing adoption of common law rule by Supreme Court's Advisory Committee).

129. *Id.* (Tatel, J., dissenting).

130. *See Jaffee*, 116 S. Ct. at 1932 (rejecting balancing test implemented by court of appeals and several states). The D.C. Circuit recognized that "dispensing with the privilege altogether would presumably have negative results." *Sealed Case*, 124 F.3d at 233. The majority noted further that any rule that restricts the privilege will cause clients to confide less in their attorneys and thus impair the provision of legal services. *See id.* (discussing adverse effects of total elimination of attorney-client privilege).

131. For a discussion of how the states apply the attorney-client privilege posthumously in nontestamentary contexts, see *supra* notes 46-61 and accompanying text.

132. *See Sealed Case*, 124 F.3d at 239 (Tatel, J., dissenting) (stating that no case law supports majority's exception to attorney-client privilege and that majority bases its decision on views of commentators whose views have not been accepted by any court or legislature). For a discussion of the general rule regarding posthumous application of the attorney-client privilege in nontestamentary contexts, see *supra* notes 46-61 and accompanying text.

133. For a discussion of the policy and principles of the attorney-client privilege, see *supra* notes 22-45 and accompanying text.

134. *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

ing test set forth by the *Sealed Case* majority makes application of the privilege contingent upon a judge's later finding that the evidentiary needs for disclosure outweigh the interests of the client.<sup>135</sup> As Judge Tatel emphasized in his dissent, clients will be less forthcoming in their communications with their counsel because they will not know whether such communications will be protected.<sup>136</sup>

By limiting the exception to the realm of criminal litigation, the majority contended that it would eliminate the uncertainty that had so concerned the Supreme Court in *Upjohn* and *Jaffee*.<sup>137</sup> Nevertheless, "any balancing approach to the privilege after the client has died is indeed likely to result in 'vague standards.'"<sup>138</sup> Such a result occurs because the individual trial judge has little reason to evaluate the effect that disclosure will have on a deceased party—a party obviously not present in the courtroom.<sup>139</sup>

In creating its exception to the privilege, the D.C. Circuit acknowledged that *Jaffee* rejected application of a balancing test; nevertheless, the majority adopted the very type of case-by-case balancing test that the *Jaffee* Court had rejected.<sup>140</sup> The D.C. Circuit proffered evidentiary need as one of the primary justifications for applying a balancing test.<sup>141</sup> Long-standing common law traditions, however, do not support the majority's propo-

135. See *Sealed Case*, 124 F.3d at 233, 235 (contending that judge must decide whether decedent's privacy interests outweigh prosecution's right to evidence and noting that in camera review may play role in application of balancing test).

136. See *id.* at 240 (Tatel, J., dissenting) (arguing that majority's balancing test is uncertain and will dissuade clients from being fully candid with their attorneys).

137. See *id.* at 234 (discussing Supreme Court's rejection of ambiguous limitations to privilege in *Upjohn* and *Jaffee* and stating that "[w]e . . . embrace the arguments for [applying a balancing test] only within the discrete zone of criminal litigation").

138. Frankel, *supra* note 11, at 68 (emphasis added).

139. See *id.* at 68-70 (arguing that interests of trial court will be in conflict with interests of absent parties who are or might be affected by judge's ad hoc rule of applying privilege). One of the primary reasons for this result is that the information a client will be most hesitant to tell an attorney in the absence of the privilege will likely be the very information that a judge will deem significant. See *id.* at 69. Consequently, under a balancing approach, a judge may find that the decedent's interests are outweighed by societal interests in obtaining relevant evidence. See *id.* (discussing undesirable aspects of public policy balancing approach).

140. See *Sealed Case*, 124 F.3d at 234 (acknowledging that *Jaffee* rejected ambiguous balancing test approach for psychotherapist-patient privilege and noting *Jaffee* Court's admonition that uncertain privilege or one that leads to varying results is little better than none at all). Despite this acknowledgment, the D.C. Circuit adopted a balancing test that balances the public's need for evidence with the decedent's interests in keeping communications secret. See *id.* (contending that need for what client told his lawyer becomes greater when remaining sources of evidence become more scarce, and this dearth of available resources coupled with "the non-existence of any client concern for criminal liability after death" permits application of balancing test in this instance).

141. See *id.* (stating that "the fewer, and the more questionable the remaining sources . . . the greater the relative value of what the deceased has told his lawyer"). The court noted that the unavailability of the witness combined with a lack of

sition that evidentiary need can overcome the attorney-client privilege.<sup>142</sup> In contrast to the majority's position, the common law has long held that, once the privilege applies, it is absolute and thus cannot be overcome by a showing of need.<sup>143</sup>

The majority's claim that the privilege leads to a loss of information is also largely unsupported by the common law.<sup>144</sup> Rather than restrict the flow of information, the attorney-client privilege creates new information by encouraging clients to be more candid with their attorneys.<sup>145</sup> In addition, the D.C. Circuit's "information loss" argument ignores one of the strongest justifications for establishment of the privilege.<sup>146</sup> Specifically, the costs resulting from the loss of relevant facts in court are justified by the societal interest in encouraging clients to be candid with their attorneys.<sup>147</sup> The *John Doe* court cogently summarized the utilitarian justifica-

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concern for criminal liability on the part of the deceased client created a narrow area of exception in which the privilege does not automatically apply. *See id.*

142. *See* LARKIN, *supra* note 41, § 2.01, at 2-8, 2-9 (stating that "once the privilege has been held applicable, information protected thereunder may not be the subject of compelled disclosure regardless of the need or good cause shown for such disclosure"); Daisy Hurst Floyd, A "Delicate And Difficult Task": *Balancing the Competing Interests of Federal Rule of Evidence 612, The Work Product Doctrine, and the Attorney-Client Privilege*, 44 BUFF. L. REV. 101, 116 (1996) (stating that "the attorney-client privilege is not overcome by application of a balancing test").

143. *See, e.g.,* Haines v. Liggett Group, Inc. 975 F.2d 81, 90 (3d Cir. 1992) (stating that documents within scope of privilege are "zealously protected"); *In re Grand Jury Investigation*, 599 F.2d 1224, 1235 (3d Cir. 1979) (noting that if policy of promoting client disclosure is to be promoted, privilege cannot be abridged); *United States v. Board of Educ.*, 610 F. Supp. 695, 701 (N.D. Ill. 1985) (stating that attorney-client privilege is absolute when it applies).

144. *See* Jaffee v. Redmond, 116 S. Ct. 1923, 1929 (1996) (stating that "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being").

145. For a discussion regarding the amount of potential evidence actually produced by the attorney-client privilege, *see supra* note 30.

146. *See Sealed Case*, 124 F.3d at 241-42 (Tatel, J., dissenting) (arguing that majority's balancing test will create chilling effect that will cause clients to reveal less information to their attorneys, thereby preventing justice system from functioning effectively). Judge Tatel asserted that the majority's contention that the attorney-client privilege leads to loss of information is unsupported by prior case law and by the views of legal commentators. *See id.* at 241 (Tatel, J., dissenting) (citing Stephen A. Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597 (1980)). Moreover, limiting the "information loss" argument to cases in which the client has died may not be feasible. *See id.* (noting that fact finder can also be denied information by witnesses who are unable to remember facts, incompetent to testify or outside of court's jurisdiction).

147. *See, e.g.,* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (stating privilege "recognizes that sound legal advice or advocacy serves public ends"); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991) (stating that sound legal advice can serve public ends and privilege plays key role in providing effective legal advice); *United States v. White*, 887 F.2d 267, 272 (D.C. Cir. 1989) (noting protections provided by privilege are strongest when client seeks attorney's advice to determine legality of conduct before taking any legal action). For a further discussion regarding the utilitarian rationale and societal benefits that the attorney-client privilege provides, *see supra* notes 27-35 and accompanying text.



tion for the privilege when it stated that "the client's and the public's interests are best served by a rule of confidentiality that applies both before and after the death of the client."<sup>148</sup>

Also intrinsic to the *Sealed Case* court's application of the balancing test was the notion that the client's posthumous reputation would be of little significance to him after his death.<sup>149</sup> Such a proposition is at odds with social realities that indicate individuals are genuinely concerned about their posthumous reputations.<sup>150</sup> Moreover, the D.C. Circuit's proposition likewise failed to consider the well-established traditions of the legal system in protecting a client's reputation after their death.<sup>151</sup>

Perhaps most significantly, the majority misapplied the law to the facts of the case.<sup>152</sup> Contrary to the court's suggestion that individuals are largely indifferent to the effects that posthumous disclosure of confidences could have on their reputations, Foster was highly concerned

148. *In re* John Doe Grand Jury Investigation, 562 N.E.2d 69, 71 (Mass. 1990).

149. *See Sealed Case*, 124 F.3d at 233 (contending that risk of postdeath disclosures will typically disturb client less than disclosures while client is alive).

150. *See* Frankel, *supra* note 11, at 61-63 (noting that expenditure of vast amounts of energy and resources by individuals for their burials reflects their interest in preserving their good name and reputation following their death). Moreover, if individuals were unconcerned with their reputations, including after their death, their moral and legal behavior would likely be worse while they were alive. *See id.* at 62-63 (presenting normative argument to support proposition that individuals are concerned about their posthumous reputations).

151. *See id.* at 63 (citing *Martin v. Shaen*, 156 P.2d 681, 684 (Wash. 1945)). In deciding whether to apply the privilege in a testamentary context, the court in *Martin* carefully considered whether the disclosure of communications between the deceased client and his attorney would tarnish the reputation of the client. *See id.* at 63, n.91 (stating that attorney-client privilege "'may be waived by the personal representative or the heir of the deceased person, particularly where the disclosure would not injuriously affect the character or reputation of the decedent'" (emphasis added) (quoting *Martin*, 156 P.2d at 684)); *see also* *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689, 693 (Pa. Super. 1976) (determining whether confidence between deceased client and his attorney contained information that would damage reputation of decedent). Before it ultimately decided not to apply the privilege to the decedent's conversation with his attorney, the court in *Cohen* emphasized that the testimony sought from the lawyer did "not contain scandalous and impertinent matter which would serve to blacken the memory of [the decedent]." *Id.*

That the law protects the reputation of the decedent is also reflected in the adoption by many states of survival statutes that allow the decedent's estate to bring tort causes of action on behalf of the decedent. *See* Frankel, *supra* note 11, at 63 n.95 (noting that "survival statutes gradually are being extended; and it may be expected that ultimately all tort actions will survive to the same as those founded on contract" (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 126, at 901 (4th ed. 1971))); *see also* N.J. STAT. ANN. § 2A:15-3 (West 1996) (permitting executors and administrators to have cause of action "for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser" and allowing executor or administrator to recover damages on behalf of decedent).

152. *See Sealed Case*, 124 F.3d at 240-41 (Tatel, J., dissenting) (contending individuals are highly concerned about their reputations and that it would be highly inappropriate in this particular case to eliminate common law's posthumous protection provided by attorney-client privilege).

about ensuring the posterity of his reputation.<sup>153</sup> As the dissent vigorously argued, “[t]he facts of the present case vividly illustrate the value a person can place on reputation.”<sup>154</sup>

## 2. *The D.C. Circuit’s Rejection of State Law Traditions*

In creating its exception to the attorney-client privilege, the D.C. Circuit also failed to acknowledge that the posthumous recognition of the privilege outside of the testamentary context appears to be the law in all states.<sup>155</sup> The Supreme Court has stated repeatedly that the policy decisions of the states affect the decision of federal courts to establish a new privilege or curtail coverage of an extant one.<sup>156</sup> As the *Jaffee* Court emphasized, “it is appropriate to treat a consistent body of policy determina-

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153. See *Madison Guaranty Hearings*, *supra* note 91, at 2028-30 (providing excerpt of Foster’s commencement speech regarding significance of reputation). At a commencement speech given to the University of Arkansas School of Law in 1993, Foster impressed upon his audience the supreme importance of establishing and maintaining an exemplary reputation:

You will be evaluated . . . by your product, your energy, your temperament and your backbone. The reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy. You will be judged by your judgment.

. . . .  
Practice law with excellence, with pride in your product. Treat every pleading, every brief, every contract, every letter, every daily task as if your career will be judged on it.

Each client is entitled to your best effort. . . . The clients you represent will remember you long after you have forgotten their names.

. . . .  
I cannot make this point to you too strongly. There is no victory, no advantage, no fee, no favor which is worth even a blemish on your reputation for intellect and integrity.

Nothing travels faster than an accusation that another lawyer’s word is no good.

*Id.* at 2028, 2029. Foster’s concern for his reputation is likewise evidenced by his suicide note in which he states that in Washington, “ruining people is considered a sport.” *Id.* at 2537.

154. *Sealed Case*, 124 F.3d at 241 (Tatel, J. dissenting).

155. See *id.* at 242 (Tatel, J., dissenting) (maintaining that posthumous application of privilege outside of testamentary context “appears to have been embraced by every state that has codified the privilege and remains the law in those that have not”). Few state statutes that codify the attorney-client privilege directly address posthumous application of the privilege, but those statutes and evidence rules which mention the testamentary exception suggest by negative implication that the privilege should continue after the client’s death. See Frankel, *supra* note 11, at 55 n.52.

156. See, e.g., *Jaffee v. Redmond*, 116 S. Ct. 1923, 1929-30 (1996) (stating that “policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one”); *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980) (citing *Trammel* for proposition that federal courts should consider state law in deciding whether to retain or expand privileges in federal court system); *Trammel v. United States*, 445 U.S. 45, 48-50 (1980) (referring to state law to support curtailment of spousal immunity privilege so that witness-spouse alone has privilege to testify adversely).

tions by state legislatures as reflecting both 'reason' and 'experience.'"<sup>157</sup> The D.C. Circuit, however, failed to heed the Supreme Court's admonition and did not adequately consider the laws of the states regarding posthumous application of the attorney-client privilege.<sup>158</sup>

The D.C. Circuit's decision to terminate the attorney-client privilege upon the death of the client in the context of criminal litigation represents a significant curtailment of the privilege. Had the majority properly applied the principles set forth in *Upjohn* and *Jaffee*, it would have ruled that the attorney-client privilege applied to the communications made between Foster and his attorney.<sup>159</sup> Moreover, the fact that the state courts apply the privilege posthumously further supports the argument that the D.C. Circuit should have upheld the privilege.<sup>160</sup> Instead, the majority relied "on views of commentators never accepted by any court or legislature."<sup>161</sup>

## V. IMPACT

The ramifications of the D.C. Circuit's opinion are troubling.<sup>162</sup> At a minimum, the D.C. Circuit's decision illustrates that the attorney-client privilege is not as strong as many in the profession may have previously believed.<sup>163</sup> The balancing test proposed by the majority undermines the element of certainty necessary for the effectiveness of the privilege.<sup>164</sup>

157. *Jaffee*, 116 S. Ct. at 1930 (quoting *Funk v. United States*, 290 U.S. 371, 376-81 (1933)).

158. See *Sealed Case*, 124 F.3d at 231-35 (failing to consider laws of states which applied privilege posthumously).

159. For a discussion of the Supreme Court's holdings in *Jaffee* and *Upjohn*, see *supra* notes 70-90 and accompanying text.

160. For a discussion of the posthumous application of the attorney-client privilege by the state courts, see *supra* notes 46-61 and accompanying text.

161. *Sealed Case*, 124 F.3d at 239 (Tatel, J., dissenting).

162. See Marcia Coyle, *D.C. Circuit Trims Client Privilege; Court Says Attorney-Client Shield Doesn't Survive Death*, NAT'L L.J., Sept. 15, 1997, at A1 (noting that one scholar feels that D.C. Circuit's opinion signifies erosion of attorney-client privilege); Robert J. Morvillo, *The Decline of the Attorney-Client Privilege*, N.Y. L.J., Dec. 2, 1997, at 3 (same); Labaton, *supra* note 95, at A17 (discussing views of several commentators who believe that D.C. Circuit's holding will discourage clients from being more open and candid with their attorneys). But see, Labaton, *supra* note 95, at A17 (discussing Professor Wolfram's view that *Sealed Case* holding will not adversely impact attorney-client relations and that creation of new exception to privilege by D.C. Circuit was necessary because investigators often have no other means of obtaining information from dead persons).

In addition, one commentator contends that courts will be most apt to apply a balancing test approach in precisely those situations in which the client would be most concerned about disclosure, namely potential criminal exposure for family and long-time friends. See Coyle, *supra*, at A1 (discussing potential pitfall of D.C. Circuit's balancing test approach).

163. See EPSTEIN, *supra* note 115, at 3 (stating which "[m]any communications that clients and lawyers mistakenly believed are privileged in fact are not").

164. See *Upjohn Co. v. United States*, 449 U.S. 338, 393 (1981) (asserting that privilege that is uncertain in its application is little better than no privilege at all).

Consequently, the test employed by the majority may result in the type of chilling effect in attorney-client communications that the Supreme Court has expressly tried to avoid.<sup>165</sup> Moreover, the fact that the D.C. Circuit employed a balancing test may encourage other courts to employ balancing tests in situations beyond the realm to which the majority has confined its holding.<sup>166</sup> As a consequence of this decision, attorneys now have the obligation to inform their clients of the possible implications of their discussions in the event of the client's death.<sup>167</sup>

Ultimately, the Supreme Court may elect to review the D.C. Circuit's decision in *Sealed Case*. The Court will be forced to decide whether the majority's need-based analysis should stand despite well-established state court precedent to the contrary.<sup>168</sup> In light of the D.C. Circuit's questionable application of both state and Supreme Court precedent, the Court will likely invalidate the exception to the attorney-client privilege created by the D.C. Circuit. Such a holding is necessary to restore the attorney-client privilege to the place it has held in the common law legal system since the sixteenth century.<sup>169</sup>

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165. See *Jaffee v. Redmond*, 1923 S. Ct. 1923, 1929 (1996) (asserting that if psychotherapist-patient privilege was rejected, conversations between patient and his or her psychotherapist "would surely be chilled"); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating that privilege "is founded upon the necessity, in the interest and administration of justice, or the aid of persons having knowledge of the law and skilled in practice, which assistance can only be safely and readily availed of when free from the consequences of the apprehension of disclosure").

166. See Coyle, *supra* note 162, at A1 (stating that scholars are concerned that D.C. Circuit's balancing test may create "slippery slope" that might encourage courts to balance in other situations such as when client has not died, but is instead temporarily incompetent).

167. See *Sealed Case*, 124 F.3d at 239 (Tatel, J., dissenting) (noting that lawyers must provide clients with new warning when advising them about confidentiality). According to Judge Tatel, attorneys will now have to advise their clients that whatever they reveal to the attorney in confidence could possibly be disclosed publicly at a later date:

I cannot represent you effectively unless I know everything. I will hold all our conversations in the strictest of confidence. *But when you die, I could be forced to testify—against your interests—in a criminal investigation or trial, even of your friends or family, if the court decides that what you tell me is important to the prosecution.* Now, please tell me the whole story.

*Id.* (Tatel, J., dissenting).

168. See McCORMICK, *supra* note 2, § 94, at 227 (noting that general rule in nearly all courts is that attorney-client privilege will survive death of client outside of testamentary context).

169. See Morvillo, *supra* note 162, at 3 (stating that various bar associations are fighting encroachments upon attorney-client privilege by judges and prosecutors, "and it is hoped that their efforts will be rewarded by renewed reverence to the values served by the privilege").

